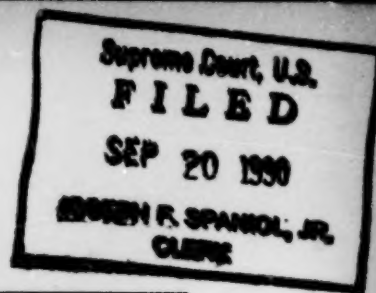


90-499

No. _____



In The
Supreme Court Of The United States

OCTOBER TERM, 1990

ACMAT CORPORATION,

Petitioner,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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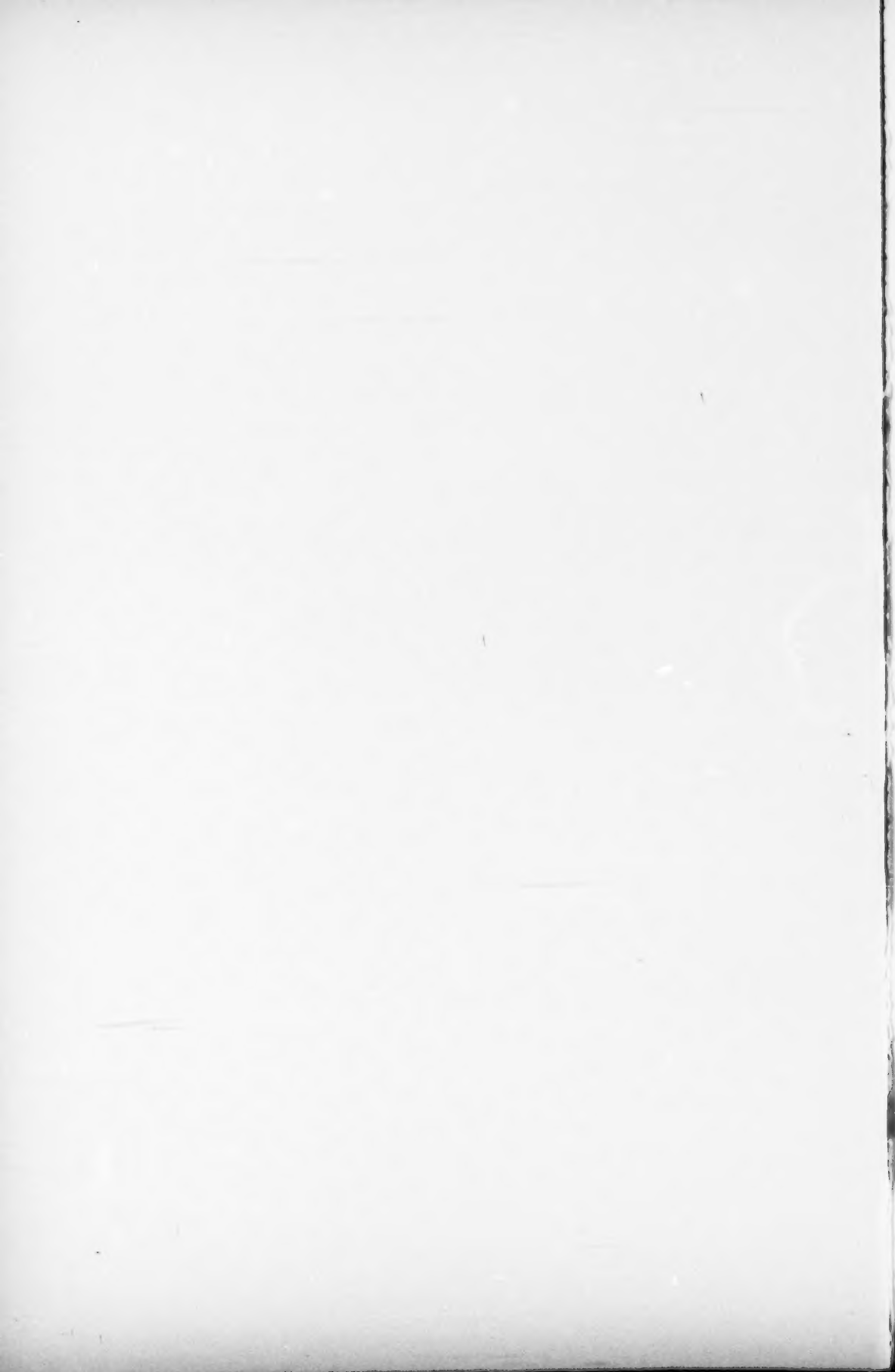
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QUESTIONS PRESENTED

1. Whether due process is violated when a federal court sitting in diversity ignores controlling precedent and holds that a political subdivision, as party to a publicly bid construction contract, can unilaterally adjudicate a contractor's claims without any hearing and without any availability for judicial review.

2. Whether a federal court sitting in diversity may reject the controlling precedent set forth in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964), and hold that a contract approved by the School Board with a differing site condition clause requires additional School Board approval for each and every item of additional work performed on account of differing site conditions.

3. Whether a contractual site inspection clause may abrogate a provision mandating an equitable adjustment for differing site conditions.

4. Whether the Court's construction of ambiguous contractual language on a motion for summary judgment is reversible error.

5. Whether triable issues of material fact precluded entry of summary judgment in favor of the School District.

6. Whether a federal court sitting in diversity may ignore controlling precedent and determine on a motion for summary judgment that qualified exculpatory language in a contract deprives a contractor of damages for delay.

*Petitioner's corporate parent, subsidiary and affiliates are: Amins, Inc., Geremia Electric Co., Acmat of Texas, Inc., Acstar Holdings, Inc., United Coasts Corp., Acstar Insurance Co. and United Coastal Insurance Co.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case. Although Hughes Urethane Construction, Inc., is listed as a third-party defendant in the caption of the Court of Appeals' Judgment Order, it had been dismissed from the action. Hughes Urethane Construction, Inc. has no interest in the outcome of the petition and is not considered a party to this proceeding. There is no other party with an interest in the outcome of the petition.

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In The

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ACMAT CORPORATION,*Petitioner,*

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SCHOOL DISTRICT OF PHILADELPHIA,*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

OPINIONS BELOW

The per curiam judgment order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the district court is officially reported as *Acmat Corporation v. School District of Philadelphia*, 904 F.2d. 693 (3rd Cir. 1990) and appears in Appendix A hereto at 1a-2a. The decision of the United

States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in Appendix B hereto at 3a-4a. The opinion and order of the United States District Court for the Eastern District of Pennsylvania, deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in Appendix C hereto at 5a-24a. The district court's decision on Acmat's motion for reargument of the summary judgment motion was issued in open court, not officially reported, is printed in Appendix D hereto at 51a-53a.

JURISDICTION

The judgment order of the United States Court of Appeals is dated May 23, 1990. Acmat's petition for rehearing was denied by order dated June 22, 1990. In accordance with Rule 13.1 and Rule 13.4, this petition is filed within 90 days of the date of the denial of the petition for rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The "Due Process Clause" of the 14th Amendment of the United States Constitution, U.S. Const. amend. XIV, §1, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens for the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Sections 1, 6, 9 and 11 of the Pennsylvania Constitution, P.S. Const. Art. 1, §§1, 6, 9, 11 provide:

Section 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Sec. 6. Trial by jury

Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case.

Section 9. Rights of accused in criminal prosecutions

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a

person may be permitted and shall not be construed as compelling a person to give evidence against himself.

Sec. 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Article 5, Section 9 of the Pennsylvania Constitution, P.S. Const. Art. 5, §9, provides:

§9. Right of appeal

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

B. STATUTORY PROVISIONS

Section 5-508 of the Pennsylvania Public School Code of 1949, 24 P.S. §5-508, provides:

§5-508. Majority vote required; recording

The affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the

following subjects:—

Fixing length of school term.

Adopting textbooks.

Appointing or dismissing district superintendents, assistant district superintendents, associate superintendents, principals, and teachers.

Appointing tax collectors and other appointees.

Adopting the annual budget

Levying and assessing taxes

Purchasing, selling or condemning land.

Locating new buildings or changing the locations of old ones.

Dismissing a teacher after a hearing.

Creating or increasing any indebtedness.

Adopting courses of study.

Establishing additional schools or departments.

Designating depositories for school funds.

Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds one hundred dollars (\$100).

Fixing salaries or compensation of officers, teachers, or other appointees of the board of school directors.

Entering into contracts with and making appropriations to the intermediate unit for the district's proportionate share of the cost of services provided or to be provided for by the intermediate unit.

Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforcible.

STATEMENT OF THE CASE

An important issue raised by this case is whether the district court's interpretation of a construction contract, that makes the School District the sole judge and jury over a contractor's claims, violates due process of law. The lower courts' holdings sanctioned a procedure whereby the Government in a public contract deprived a contractor of any hearing of its contract claims and further deprived the contractor of judicial review. The decisions make the School District judge of its own cause. Significantly, the lower courts' holdings sharply conflict with controlling Pennsylvania precedent and decisions issued by other federal courts. In addition, the district court, in contravention of the rules governing summary judgment, lumped many of Acmat's claims together, labelled them "extra work" items and summarily dismissed those claims without regard to the fact that many of the items had their genesis in breach of contract, differing site conditions and delays caused by the School District. As a consequence, the lower courts imbued the School District with contractual immunity, a principle that the Pennsylvania legislature has declined to enact into law.

This is an issue of great practical significance because the decision deviates from well settled Pennsylvania precedent that permits a contractor to sue a political subdivision for breach of contract and also to recover for differing site conditions when its contract so provides. If the lower courts' holdings are allowed to stand, they will impact on the entire construction industry in the Commonwealth of Pennsylvania and will undoubtedly result in skyrocketing construction costs to the Commonwealth. Moreover, the decisions represent a major leap backward in the evolution of construction contract law in the United States and the Commonwealth of Pennsylvania.

A. Statement of Facts

In or about April and June 1984, Acmat and the School District entered into separate contracts for asbestos abatement in three school buildings in the City of Philadelphia. The significant provisions are identically worded in each of the contracts. The pertinent portion of the Rush School contract is annexed in Appendix ("App.") E at 82a-96a. Almost from the start, Acmat encountered conditions that differed materially from those shown on the plans and specifications for the projects and differed from those it observed in pre-bid inspections. Moreover, the School District breached the contracts in many respects. The School District unreasonably interfered with construction by permitting the premises to flood, conducting improper and late inspections, issuing defective plans and specifications and ordering work that caused disruptions. Other breaches involved a dispute over the scope of work required by the contracts. The foregoing resulted in enormous delays and the loss of millions of dollars by the contractor.

B. Prior Proceedings

The action was commenced in 1985 with the filing of a complaint in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity of citizenship. 28 U.S.C. §1332.

The District Court (Giles, J.) by order dated December 21, 1988, granted partial summary judgment to the School District (App. C at 5a-24a). The District Court dismissed the claims for differing site conditions because of its erroneous determination that additional School Board approval was required for each such claim despite the School Board's initial approval of the contracts with a differing site condition clause by the School Board. Similarly, the claims for

breach of contract were summarily dismissed because of the absence of School Board approval for the additional labor and concomitant costs for work made more difficult and expensive by School District breaches.

Other claims asserted by Acmat were allowed by the district court, but only because of School District acknowledgment of their legitimacy. However, the district court, relying on certain contract language, restricted compensation for these claims to that amount unilaterally determined by the School District, and further held that "... the claims for time and material costs are not subject to judicial review." (App. C at 9a).

The claims for delay damages were dismissed by the district court based upon certain purported exculpatory contract language.

Accordingly, the district court's order was based primarily on its misinterpretation of applicable Pennsylvania state law and the erroneous construction of an agreement that was patently ambiguous and required interpretation by the jury. The district court made factual determinations of disputed material issues of fact and ruled that Acmat's claims were subject to summary dismissal.

The district court ignored the state court precedents cited, *infra*, which allow Acmat recovery of its damages. A motion to reconsider was also denied. (App D at 51a-53a).

The School District's counterclaims and Acmat's sole remaining claim for contract retainages was tried to a jury and culminated in an Amended Final Judgment dated October 24, 1989. (App. F at 97a-98a). However, after trial, but before the Amended Final Judgment was entered, the district court entertained argument and thereafter reduced the amount previously awarded Acmat because the School District's expert re-evaluated the amounts it would have allowed Acmat for work it acknowledged was compensable. (App.G at 99a-128a).

Acmat's appeal and the School District's cross-appeal were argued before the United States Court of Appeals for the Third Circuit. A Per Curiam Judgment Order, without any discussion of the case, affirming the judgment of the District Court is dated May 23, 1990. *Acmat Corporation v. School District of Philadelphia*, 904 F.2d 693 (3rd Cir. 1990). (App. A at 1a-2a). Acmat's Petition for Rehearing was denied by decision dated June 22, 1990. (App. B at 3a-4a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS OF DUE PROCESS AND THE DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

A. The district court ignored binding state court precedent set forth in *John F. Harkins Co., Inc. v. School District of Philadelphia* and made the School District's determination of Acmat's claims final and binding without a hearing and without the availability of judicial review.

Although the great majority of Acmat's claims were summarily dismissed in the district court's order of December 21, 1988, the court did find entitlement for a group of claims that the School District acknowledged in writing. Having made that determination, the district court adopted the sum unilaterally and arbitrarily designated by the School District as being due. There was no hearing conducted or evidence received since the court concluded that it was without jurisdiction to rule on the question.

The District Court in interpreting Article 14(c)¹ of the contract wrote:

10. Work directed to be undertaken by ACMAT on a time and material basis was subject, by contract

¹ **14. MODIFICATION OF CONTRACT DOCUMENTS**

(a) The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in contract price being subject to the approval of the Board.

(b) The determination of the increase or decrease in compensation to be paid to the contractor for additions to or reductions in the work, respectively, shall be determined by application of unit prices when such are set forth in the Special Conditions of the contract, or, in those cases where unit prices are not applicable, by a lump sum mutually agreed upon by the Board and the contractor. If however, unit prices are not applicable and if the parties cannot agree upon a lump sum, then additional compensation to be paid the contractor shall be determined by the actual net cost in labor and materials, plus fifteen percent (15%) for profit and overhead. Reductions in the contract price in the form or [sic] credits shall be determined by the actual net cost in labor and materials if the aforementioned lump sum cannot be agreed upon. The fifteen percent (15%) for profit and overhead will be retained by the contractor. The School District will make the final determination as to net cost of labor and materials.

(c) Should the contractor encounter subsurface and/or other conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the School District of such conditions, before they are disturbed. The School District will investigate the conditions and if it finds that they materially differ from those shown on the drawings or indicated in the specifications, it shall make such changes in the drawings and/or specifications as it may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes.

language, to the School District's final determination as to net costs of labor and material. Thus, the claims for time and material costs are not subject to judicial review. The School District's contractual right of final determination necessarily includes the form and extent of proof and actual expenditures by the contractor. However, the court can decide whether there was written authorization from the School District to ACMAT to undertake work on a time and material basis. App. C at 9a.

The district court then proceeded to list each of Acmat's claims and to accept the meager amount allocated by the School District on a minority of the claims and nothing on the remaining claims.

This approach was totally contrary to the holding of the Pennsylvania Superior Court which expressly rejected the idea that the subject language could make the School District's determination final and binding.

In *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A.2d 260 (1983), the Court wrote:

In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor.*

(d) Verbal instruction given by any of the officers, agents, or employees of the Board which depart from the contract documents shall not be binding upon the Board.

John F. Harkins, supra at page 265. Emphasis supplied.

The Court in *Harkins*, consistent with principles of due process, construed the subject language as simply requiring an intermediate step in the process of having a dispute with the School District resolved in court. The contractor was permitted to try its claims, even though the agreement contained contractual terms that are very similar to those under review herein. Regrettably, neither the district court nor the Court of Appeals addressed the *Harkins* case although they had the obligation to apply state precedent in this diversity action. *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). It is clear that Acmat never waived its constitutional right to a hearing or to have its claims heard in a court of law. Such a waiver, if it could be effective, would surely have to be explicit and unequivocal. That standard was not been met by the contracts and certainly was not met by Article 14.

Consequently, the application given the contractual provisions by the district court clearly violated the guarantee of due process as required by the constitutions of the United States and the Commonwealth of Pennsylvania. Clearly one party to a contract has too great a pecuniary and other interests in the outcome of its own dispute to allow it to sit as judge and jury without a hearing and without judicial review. The lower courts' holdings put the proverbial "fox in charge of the chicken coop".

In *Logan v. Zimmerman*, 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed. 2d 265 (1982), this Court held that it would be a denial of due process to permit the state to deprive litigants from using established adjudicatory procedures.

The Court wrote:

Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371,380 (1971).

* * *

Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480,491(1980). See *Arnett v. Kennedy*, 416 U.S., at 166-167 (POWELL, J., concurring in part); *id.*, at 211 (MARSHALL, J., dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest,...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards...[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Vitek v. Jones*, 445 U.S., at 490-491, n. 6, quoting *Arnett v. Kennedy*, 416 U.S., at 167 (opinion concurring in part).

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571, n. 8 (emphasis in original). And that is why the Court has stressed that, when a "statutory scheme makes liability an important factor in the State's determination..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S., at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See *id.*, at 542 *Logan v. Zimmerman*, *supra* at pages 429, 430, 432, 433 and 434.

In *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed. 2d 113 (1971), this Court interpreted access to the Courts as an element of due process and wrote:

It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty

nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

* * *

The State's obligations under the Fourteenth Amendment are not simply generalized ones, rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due. *Boddie v. Connecticut*, 401 U.S. at 375, 380.

In *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), the Court held that due process was violated when an officer acting in a judicial capacity had an interest in the controversy. The mayor in *Tumey*, *supra*, as the School District in the case at bar, was charged with fiscal responsibilities and could not be expected to adjudicate a dispute that impacted on those obligations. Acmat, like the accused in *Tumey*, *supra*, has a right to an impartial judge. Unlike the accused in *Tumey*, *supra*, Acmat did not have a hearing of any kind on those items where the district court simply adopted the position of the School District.

It is submitted that the provisions of the Pennsylvania Constitution set forth above lend additional support to this argument. See also, P.L.E. Constitutional law §135.

Similarly, it is well established that due process is violated when a third-party acting as judge of a controversy has some bias or where there is a commingling of judicial and prosecutorial functions. *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1976).

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, 89 S. Ct. 337, 340 (1968), rehearing denied, 393 U.S. 1112, the Court held:

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

In *Annenberg v. Roberts*, 333 Pa. 203, 2 A.2d. 612(1938), the Court held that a party aggrieved in proceedings before a nonjudicial body is entitled to the opportunity for a judicial hearing. The instant case is even more compelling than those immediately cited above since there wasn't even the pretense of a hearing.

It is apparent that the construction given Article 14 of the contracts by the lower courts is contrary to due process. The Superior Court of Pennsylvania in *Harkins, supra*, clearly stated that the subject language was to be construed as only requiring an intermediate step in the adjudicatory process.

There was no waiver of Acmat's constitutional right to access to the courts. The Court of Appeals unfortunately sanctioned the district court's departure from these fundamental principles of law.

**II. THE DETERMINATION THAT ACMAT'S CLAIMS
FOR DIFFERING SITE CONDITIONS ARE BARRED IS
CONTRARY TO THE CONTRACTUAL AGREEMENT
AND THE PENNSYLVANIA SUPREME COURT'S
HOLDING IN *TEODORI V. PENN HILLS
SCHOOL DISTRICT AUTHORITY***

A. Article 14 was misinterpreted by the lower courts.

Fundamentally, the lower courts failed to understand that each of Acmat's claims was precipitated by a different event. Some of the claims were caused by breaches of contract. Other claims resulted from differing site conditions or delays caused by the owner. The common law and provisions of the contracts provided a mechanism for compensating the contractor. A review of Article 14 of the contracts shows that the lower courts misconstrued its provisions and ignored the precedent set forth in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964), which made crucial distinctions among the provisions of the School District contracts. Article 14(a) is intended to cover those situations where the School District unilaterally orders changes to the contract.² Article 14(c) is intended to cover those situations where differing site conditions cause more work to be performed. Work that results from causes governed by either Article 14(a) or Article 14(c) is to be compensated in accordance with the provisions of Article 14(b). In all other respects, Articles 14(a) and 14(c) are separate and distinct from each other. The unit prices referred to in Article 14(b) were not

² Acmat's claim arising under Article 14(a) is for work that received School Board approval before it was performed because the School District initiated changes which all parties recognized were not within the parameters of the initial contract. However, Acmat did not agree to a lump sum change in its contract price and Acmat alleged that it was entitled to an equitable adjustment. It is a clear denial of due process to permit the School District to unilaterally order changes in work and also to unilaterally determine the amount that Acmat should be paid therefor.

applicable and the parties could not agree on a lump sum settlement for any of the claims. Accordingly, actual net cost was to form the basis for compensation of the differing site condition claims arising under Article 14(c).

The foregoing categorization and distinctions were examined and adopted by the Supreme Court of Pennsylvania in *Teodori v. Penn Hills School District Authority*, *supra*.³ The *Teodori* decision clearly

³ Authority next argues that the contract between the parties provided no agreement to pay for extra work in the amount claimed by Teodori. This contention is based upon the "Changes and Alterations" section of the contract, which clearly provides that such "changes and alterations" be made by written order. This argument completely ignores the section of the contract dealing with "Conditions Differing From Those Shown on Plans or Indicated In Specifications", set forth in full above. The parties obviously contemplated the possibility of the exact type of contingency which arose, and provided for it in the contract.

We agree with the conclusion of the Court below, that Teodori's right to extra compensation, if any, is governed by the "differing conditions" clause, and not by the "changes and alterations" clause, the extra compensation not being sought for "changes" and/or "alterations" as those terms were used in the contract.

Nor are we moved by Authority's argument that the award of extra compensation is contrary to the provisions of the School Code or Municipality Authorities Act. . .

The contract in the instant case was entered into under circumstances which fully complied with the above statute. The extra work which the plaintiff was required to do and upon which his claim is based was a natural extension of the quantum of the work contemplated by the original contract and was clearly covered by an express provision thereof. No work not encompassed in the original contract was presented by discovery of the gasoline line, and thus no physical changes or alterations in the contract documents were necessitated thereby. The end product of the site preparation remained exactly as originally planned; only the manner of accomplishing it was affected. The contract unequivocally provided for this contingency, and the plaintiff had a clear contractual right to adjust his method of operation and to recover his additional costs within the contract framework.

shows that provisions in the changes section of Article 14(a) have no bearing on claims made under the differing site conditions clause of Article 14(c).

The lower courts ignored⁴ the controlling precedent of *Teodori* and improperly merged the terms of Articles 14(a) and 14(c) so as to require School Board approval of differing site condition claims. Contrary to the statements made in paragraphs 6 and 7 of the District Court's order (App. C at 7a), School Board approval is not a requirement in Article 14(c). (App. E at 91a). Nor were changes in plans required or a necessary condition to compensation for differing site conditions. Article 14(c) refers only to changes in drawings by the School District, "as it may find necessary". In this instance the differing site conditions did not require changes in drawings. The fact that notice was given by Acmat of the differing site conditions and that written direction to proceed was issued by the School District is fully documented and was part of the record before the lower courts. School Board approval of the differing site provision was received prior to the execution of the contracts. The contracts do not indicate that further School Board approval is required in order to recover for claims necessitated by differing site conditions. At the very least, the district court's order does reflect, what may be ambiguities in Article 14 that create a jury question and which should have resulted in denial of summary judgment.

Here, the contract foresaw the possibility of what actually occurred, and *Teodori* complied with the governing provisions of the contract . . . *Teodori v. Penn Hills School District Authority*, 196 A. 2d at 309. Emphasis supplied.

⁴ Indeed, the lower courts did not even discuss the application of *Teodori*, although it was cited and extensively briefed by Acmat.

B. The holding that the contract site inspection clause subsumes the differing site conditions clause is contrary to *United States v. Spearin* and prevailing law.

Another reason given by the district court for denying claims made under the differing site conditions clause was its conclusion that Acmat did not make a reasonable site inspection.⁵ (App. C at 8a, 9a). The fact that a site inspection was conducted was established by affidavit. Further affidavits were furnished on the motion for reargument, but were apparently ignored by the lower courts. The record clearly showed that a site inspection was made and that the question of how reasonable it was under the circumstances was a matter for the jury. Moreover, the pre-bid site inspection clauses⁶ do not mandate a comprehensive investigation that would require dismantling of permanent structures. Rather, the contract required

⁵ This was a disputed issue of material fact improperly decided by the judge on motion for summary judgment.

⁶ The first inspection Clause is contained in paragraph 7 of the General Conditions and states the following:

7. CONDITIONS AFFECTING THE WORK

(a) The Contractor shall be responsible for ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the School District. The School District assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the receipt and opening of bids other than by a bulletin or addendum that is duly issued. App. E at 88a.

The second site inspection clause is contained in Article SC-07 of the Special Conditions and reads as follows:

SC-07 EXAMINATION OF THE SITE

The contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully *on all determinable*, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same. (Emphasis supplied). App. E at 95a.

a visual examination to determine the nature and location of the work.⁷

In *U.S. v. Spearin*, 248 U.S. 132, 137, 39 S.Ct. 59, 63 L.Ed 166 (1918), this Court held:

But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume the responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

⁷ A differing site condition is not a condition that either party knows about in advance of bidding. It is not a condition that a mere site inspection would disclose. If it were, since the owner and its representatives are even more familiar with the site than are prospective bidders, such work would be included in the base contract. The differing site conditions clause is included to compensate a contractor for those conditions that neither party knows about, that may be encountered, and are not readily ascertainable at the time of bidding. Certainly, it is not included, with its concomitant promise to pay, only to be later snatched back with spurious arguments to the effect that the bidder should have somehow "discovered" the condition prior to bidding.

In *United Contractors v. U.S.*, 368 F. 2d 585, 598, 177 Ct.Cl. 151 (1966), the Court wrote the following:

But we have held, in comparable circumstances, that broad exculpatory clauses (identical in effect with this one) cannot be given their full literal reach, and "do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate." *Fehlhaber Corp. v. United States*, 151 F. Supp. 817, 825, 138 Ct. Cl. 571, 584 (1957), cert. denied 355 U.S. 877, 78 S. Ct. 141, 2 L.Ed.2d 108. As *Fehlhaber* said, general portions of the specification should not lightly be read to override the Changed Conditions clause. *Ibid.* It takes clear and unambiguous language to do that, for "the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application * * *." *Thompson Ramo Woodridge Inc. v. United States*, 361 F. 2d 222, 238, 175 Ct. Cl. , (1966).

See also, *Farnsworth & Chambers Co., Inc. v. U.S.*, 346 F.2d 577, 171 Ct. Cl. 30 (1965) and *Town of Longboat Key v. Carl E. Widell & Son*, 362 So. 2d 719 (Fla. Dist. Ct. App. 1978). Reliance by the district court on *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), was misplaced. The site investigation clause in *Nether*, *supra*, was far more comprehensive than the one in the School District contracts and there was no differing site condition clause to consider in *Nether*.

III. DISMISSAL OF ACMAT'S BREACH OF CONTRACT CLAIMS IS CONTRARY TO LAW

The School District breached the contracts in several respects. Acmat was ordered to perform work out of sequence and was compelled to clean and re-clean areas to a point that exceeded contractual requirements. Moreover, the School District permitted elevators that were used to move materials to stop functioning and permitted pipes to break and flood one building. These breaches by the School District caused Acmat to remain on the project far longer than it would have otherwise and to expend additional sums of money for labor and materials. Despite these serious allegations the district court in paragraph 1 of its order (App. C at 5a) dismissed the breach of contract claims because of its perception that the breach claims constituted "extra work" and were barred by Section 5-508 of the Pennsylvania School Code of 1949, 24 P.S. §5-508 (requiring prior School Board approval) and *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In short, the district court's holding was that a contractor cannot recover for breach of contract unless the School Board approves the School District's breach, a clear denial of due process.

As a consequence, the district court and the Court of Appeals have imbued the School District with an immunity from claims for breach of contract that the legislature has declined to enact into law. Indeed, the Pennsylvania Constitution permits such suits to be brought. P.S. Const. Art. 1, §11. Although more work and a concomitant increase in costs were the result of the School District's breaches, the breach claims are not transformed into a claim for "extra work" which involves a change in scope to the original contract. The claims at issue herein involve contract work which was made more difficult and expensive by virtue of the School District's breaches. In *Nether Providence Township School Authority, supra*, the claims involved

the clearing of an area not included in the scope of work and was extra to the contract. It did not concern breaches that impacted on work that was within the original scope of work. The district court's order and the Court of Appeals' affirmation of that order show a failure to understand these well recognized distinctions. For these reasons, the district court's reference to the School Code is inapposite. Moreover, the district court's categorization of claims as extra work was incongruous, and at the very least, an issue for the jury. Dismissal of the breach of contract claims was a clear denial of due process.

IV. THE DISTRICT COURT IMPROPERLY DECIDED DISPUTED ISSUES OF MATERIAL FACT ON A MOTION FOR SUMMARY JUDGMENT

Even a cursory review of the district court's order shows that it made impermissible findings of fact in a motion for summary judgment. See *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986) and *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed. 2d 538 (1986).

In the instant case, the district court addressed each of Acmat's claims, made findings of fact, including whether or not conditions were concealed, and fully adjudicated Acmat's claims, except the claim for contract retainages. Most unusual was the district court's categorization of claims as "extra work" when the evidence showed that the claims derived, for the most part, from breaches of contract and differing site conditions. Thus, the district court's factual determination, in the context of summary judgment, that work was "extra" to the contract was improper and should have been left to the jury.

Another critical issue of fact decided by the district court on summary judgment, was that Acmat did not conduct a reasonable pre-bid site inspection. (App. C at 7a-9a). Moreover, the District Court eschewed the idea that a differing site condition clause could allow a contractor to receive compensation beyond its contract price.

To permit a contractor to claim belatedly that it could not discover the scope of the work through pre-bid inspection, and without more, to collect for work not approved as an "extra", would nullify the contract provisions controlling bidding and performance and undermine the fiscal authority and responsibility of the public contracting body. (App. C at 8a).

The district court's apparent concern about fiscal responsibility was entirely inappropriate, but does support the principle that the School District cannot sit in judgment of its own cause. Significantly, the School District could have let the contract without a differing site condition clause, if it wished to entertain large bids in anticipation of contingencies that could arise. However, Government entities, including the United States Government and the Commonwealth, have discovered that their overall expenditures for construction are lower when their contracts contain a differing site condition clause.

There was more than enough evidence to show that a reasonable site inspection was performed. Of course, the question of the "reasonableness" of the inspection was a matter for the jury.

Moreover, it is submitted that the ambiguity of the contract language required interpretation by the trier of fact.

**V. THE DETERMINATION THAT THE CONTRACTOR
IS BARRED FROM RECOVERING DAMAGES FOR
DELAY IS CONTRARY TO COATESVILLE
CONTRACTORS & ENGINEERS, INC.
V. BOROUGH OF RIDLEY PARK**

The District Court simply denied Acmat's claims for delay damages because of "specific language of the written contracts".⁸ (App. C at 9a). It made no inquiry into the factual basis of Acmat's claims and ignored the Pennsylvania precedent that permits damages for delay despite exculpatory contractual language.

In *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862, 865, 866 (1986), the Court held:

The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary in the prosecution of the work. *Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*, 409 Pa. 465, 187 A.2d 157 (1963); . . . "[W]here an owner by an

⁸ Article 15(c) of the contract provides:

If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor, fires, floods, epidemics, quarantine restrictions, strikes, or freight embargoes, the period herein-above specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall not be entitled to any damages or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes. (App. E at 92a).

unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, [the owner] will be liable for damages resulting therefrom." *Henry Shenk Company v. Erie County*, 319 Pa. 100, 178 A. 662 (1935)

See also, *Commonwealth of Pennsylvania v. General Asphalt Paving Co.*, 46 Pa. Commw. Ct. 114, 405 A.2d 1138 (1979).

The exceptions enumerated in *Coatesville* were the precise events that occurred in the instant case. Clearly a factual determination was required prior to a ruling by the Court as to the nature of the School District's conduct in causing delays to the Project. The record before the district court was more than sufficient to permit the issue of delays to go to the jury. The School District, in numerous instances, actively interfered with the work or failed to act in some essential manner.

Delays caused by unanticipated changes at the job site are certainly compensable. In addition, the School District's breaches, including unreasonable inspection requirements and delays in inspection, all impacted on the progress of the job and constituted active interference.

Acmat was denied the opportunity of showing that the exculpatory language did not apply to it under the circumstances of this case.

VI. ACMAT WAS DENIED A FULL AND FAIR HEARING ON THE CLAIM FOR CONTRACT RETAINAGES

A. The alleged failure to furnish dump tickets was an immaterial breach of the Contract.

The only claim of Acmat to survive summary judgment was for contract retainages in the sum of \$150,909.14. The district court ruled, however, that Acmat must furnish all of the asbestos dump tickets to recover its contract retainages. The Court refused to allow the jury to find that the dump tickets were an immaterial breach and did not instruct them on this issue. Parenthetically, dump tickets are the documentary receipt given at the dump sites upon delivery of debris. Significantly, there was no claim of injury or damages on account of the School District's not having the dump tickets. Nor was there any allegation that the debris was not properly removed. In spite of this fact, the district court ruled that the dump tickets were an absolute condition precedent to recovery of the retainage. This was clear error. See *Gray v. Weiss*, 519 A.2d 716 (Me. 1986) and *Formigli Corp. v. Fox*, 348 F.Supp. 629 (E.D.Pa. 1972).

VII. DISMISSAL OF THE CLAIM FOR QUANTUM MERUIT RECOVERY WAS IMPROPER AND CONTRARY TO DERRY TOWNSHIP SCHOOL DISTRICT V. SUBURBAN ROOFING CO., INC.

The district court's order dismissing Acmat's alternative count for quantum meruit recovery was based on the absence of School Board approval.⁹ It is axiomatic that no claim for quantum meruit recovery will have School Board approval. It is the lack of formal

⁹ Plaintiff's other contract claims, based upon theories of *quantum meruit*, unjust enrichment, equitable adjustment, promissory estoppel, and modified contract, also fail because of the absence of formal approval of the claimed extra work by a majority of the members of the School Board as is required by state statute. (App. C at 6a).

prerequisites that give rise to quantum meruit recovery. Accordingly, the district court's decision dismissing the quantum meruit count in the amended complaint on the grounds that there was no School Board approval is paradoxical and contrary to law. The issue is whether the factual basis of Acmat's fifty-eight or so claims can give rise to quantum meruit recovery, if not otherwise recoverable on a contractual theory. Of course, this requires a factual determination based on oral and documentary evidence.

In *Derry Township School District v. Suburban Roofing Co., Inc.*, 102 Pa. Commw. Ct. 54, 517 A.2d 225, 229 (1986), the Court allowed quantum meruit recovery and wrote:

The District misrepresents the Contractor's claim which is not for compensation for extra work performed under changes to the contract, rather, the Contractor is asserting a claim for its reasonable costs incurred in reliance upon the District's interpretation of the Contractor's performance under the terms of the contract, which interpretation the District later altered to the Contractor's detriment. This is a proper case for equitable estoppel. In *Department of Environmental Resources v. Dixon Contracting Co., Inc.*, 80 Pa. Commonwealth Ct. 438, 471 A.2d 934 (1984), we held that equitable estoppel can be applied to a governmental agency to preclude that agency from depriving a person of a reasonable expectation when such agency knew or should have known that such person would rely upon the representation of the agency. *Id.* at 443, 471 A.2d at 936-937; *see also, De Frank v. County of Greene*, 50 Pa. Commonwealth Ct. 30, 412 A.2d 663 (1980).

As was the case in *Derry, supra*, Acmat was severely damaged by the School District's interpretation of the contract and was compelled to expend substantial additional sums to perform the work. If not otherwise recoverable under one of the other theories discussed previously, these claims should be redressed on a quasi-contractual basis. A claim that stands out as a prime example is the work in the faculty cafeteria at the Lincoln School. Acmat was ordered to perform asbestos abatement in the area and did all the work preparatory to the actual abatement. The School District then halted the work and refused to compensate Acmat for the additional work claiming it was within the scope of the original contract.

Another example was the order to clean instructional material that was later rescinded after causing much havoc and disruption to Acmat's performance.

The issue is factual in nature and not, as the district court stated, whether the School Board ever approved the work. It was reversible error to summarily dismiss the quantum meruit count.

CONCLUSION

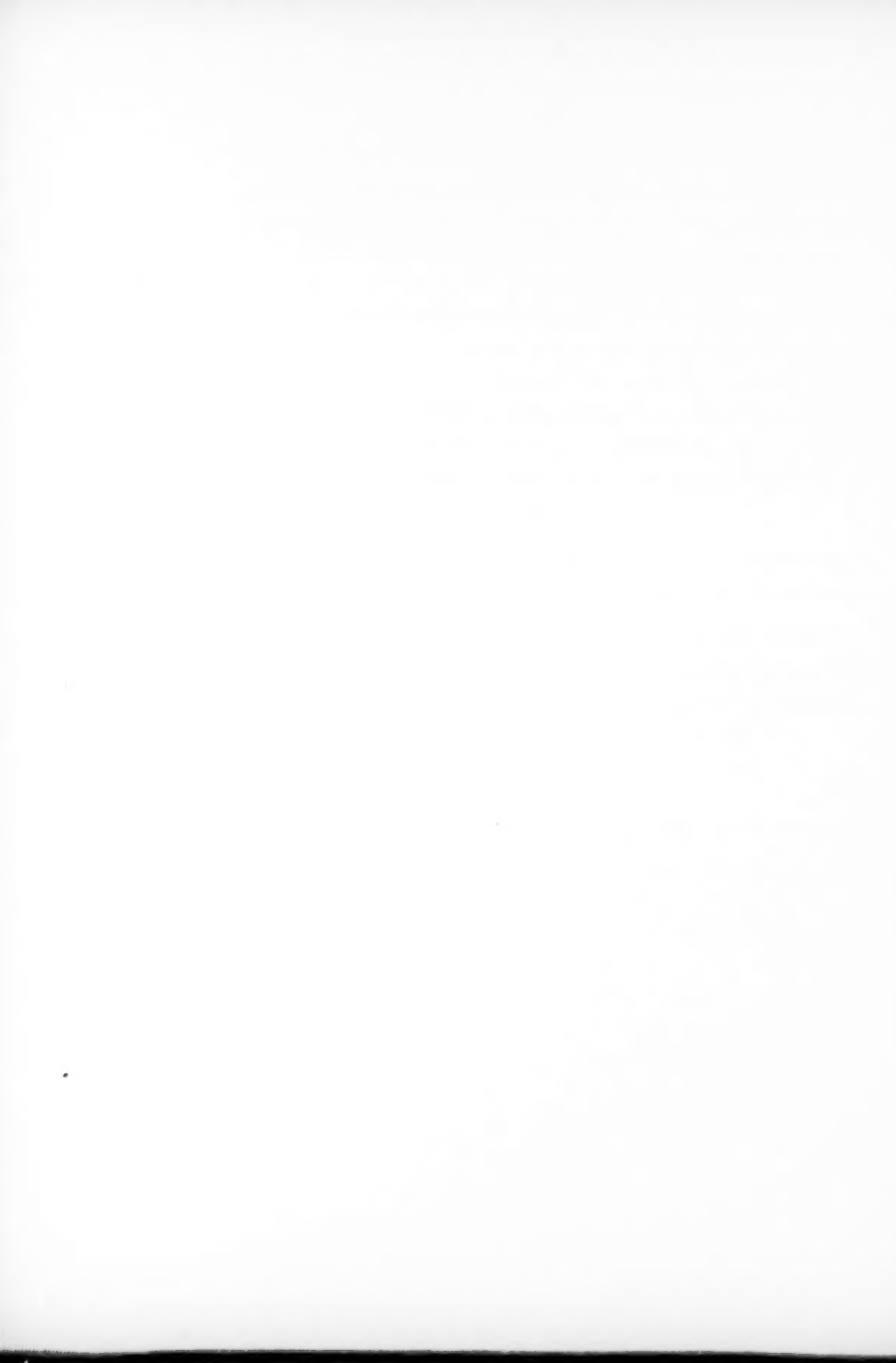
For these reasons, a writ of certiorari should be issued to review the judgment order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

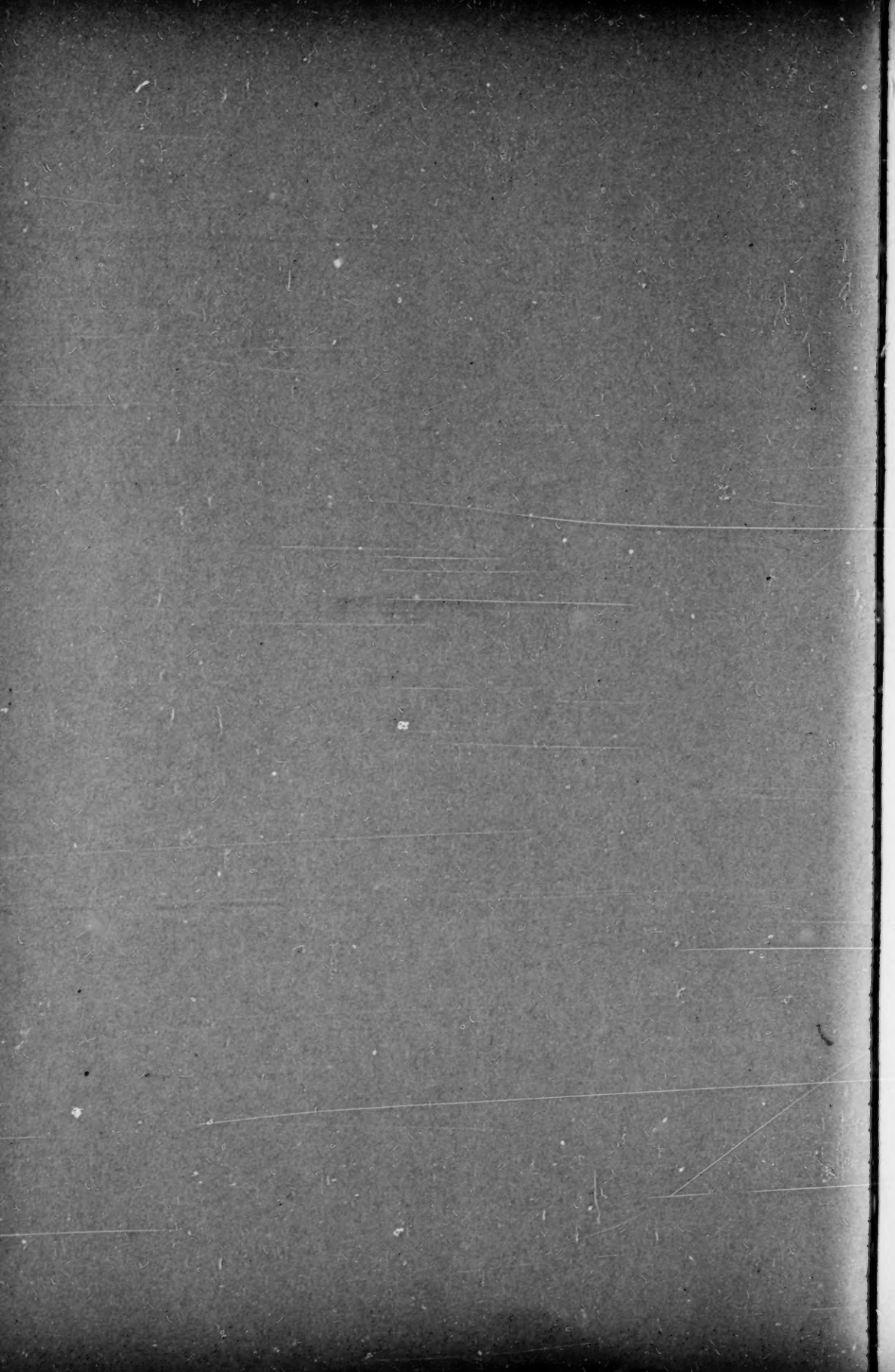
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Joseph P. Dineen
Edward A. Stein
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Of Counsel

September 17, 1990



APPENDICES



1a

**APPENDIX A—PER CURIAM JUDGMENT ORDER OF
THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT, AFFIRMING THE JUDGMENT
OF THE DISTRICT COURT**

**United States Court Of Appeals For
The Third Circuit**

NOS. 89-1930 and 89-1953

ACMAT CORPORATION,

Appellant in No. 89-1930

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Plaintiff on a Counterclaim,

Appellant in No. 89-1953

v.

ACMAT CORPORATION,

Defendant on a Counterclaim

v.

HUGHES URETHANE CONSTRUCTION, INC.,

Third-Party Defendant on a Counterclaim

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania**

2a

Appendix A

(D.C. Civil No. 85-7067)

Argued May 21, 1990

Before: SLOVITER, NYGAARD, and ALDISERT,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is
ADJUDGED and ORDERED that the judgment of the district
court be and is hereby affirmed.

Each party to bear its own costs.

By the Court,

signature
Circuit Judge

Attest:

signature
Sally Mrvos, Clerk

Dated: May 23, 1990

**APPENDIX B—ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT,
DENYING THE PETITION FOR REHEARING**

**United States Court Of Appeals For
The Third Circuit**

Nos. 89-1930 and 89-1953

ACMAT CORPORATION,

Appellant-Cross-Appellee

v.

SCHOOL DISTRICT OF PHILADELPHIA

SUR PETITION FOR REHEARING

**Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD and
ALDISERT*, *Circuit Judges***

The petition for rehearing filed by Appellant-Cross-Appellee Acmat Corporation in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix B

By the Court,

signature
Circuit Judge

Dated: June 22 1990

* Hon. Ruggero J. Aldisert, Senior Circuit Judge, as to panel rehearing only.

**APPENDIX C—ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA DATED DECEMBER 21, 1988**

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

/Stamp/

ACMAT CORPORATION

CIVIL ACTION

v.

NO. 85-7067

SCHOOL DISTRICT OF PHILADELPHIA, et al.

ORDER

AND NOW, this 21st day of December, 1988, upon consideration of the motion for partial summary judgement of defendant, School District of Philadelphia and the response in opposition of plaintiff, ACMAT Corporation, is it hereby ORDERED that the School District's motion is GRANTED in part and DENIED in part, for the following reasons and to the following extent:

1. The claims for breach of express contract are barred, as a matter of law, except where noted below, due to the absence of Philadelphia School Board approval of the claimed extra through formal resolution by a majority of its members. Such written approval is required by statute, Section 5-508 of the Pennsylvania Public School Code of 1949, 24 Pa. Stat. Ann. § 5-508, and the specific provisions of the underlying contracts. Waiver of public contract provisions regulating change orders can be accomplished only by the public

Appendix C

body authorized to enter into the contract. *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904, 907 (1984). Anything less falls short of School Board approval.

2. Plaintiff's other contract claims, based upon theories of *quantum meruit*, unjust enrichment, equitable adjustment, promissory estoppel, and modified contract, also fail because of the absence of formal approval of the claimed extra work by a majority of the members of the School Board as is required by state statute.

3. The claim of fraud is dismissed for failure to state a claim. By reason of express provisions of the School Board approved contracts, ACMAT knew that any work that it undertook which it believed to be beyond the scope of an original contract, and for which it would seek to be paid extra, required formal approval by a majority of the members of the School Board. Where it did not have such approval before commencing the extra work, and had no contract addendum, ACMAT could not have relied justifiably upon the advices or representations of the employees of the School District as binding upon the members of the School Board. Any reliance upon such advice had to have been done knowingly at defendant's own peril, that is to say, with the hope that the extra work, and documentation of it, would prove satisfactory to the School District and win School Board ratification. Therefore, as a matter of law, the fraud claim fails both against the School Board and the School District.

4. The RICO claim fails to state a claim because, *inter alia*, there was no fraud. Moreover, the School District cannot be both the "person" charged with the RICO violation and the enterprise under 18 U.S.C. § 1962(c).

Appendix C

5. The negligence claims are barred as matter of law because the School District is immune from liability for negligent behavior under the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, *et seq.* Any basis for recovery on the plaintiff's contracts must be based on contract law, not tort law.

6. Section 14(c) of the contracts does not permit payment for extra work without School Board approval even if the School District made changes in drawings and/or specifications. The contracts require Board approval of all changes in scope and price, and all changes to be in writing. The phrase "an equitable adjustment shall be made" is modified by a preceeding sentence which advises that any change in drawings or specifications requires Board approval. In short, Section 14(c) gives notice that the Board has the right not to fund a project unless and until it is satisfied both as to the change in scope of work and the price and approval is formalized.

7. Section 16(c) of the contracts does not relieve the defendant of obtaining School Board approval of extra work orders. The contract requires that if the contractor incurs conditions at the site materially different than anticipated, the School District must be notified to investigate the conditions and to determine if any change in the contract is necessary, whether there exists an emergency or not. Newly discovered materially different conditions are required to be left undisturbed pending School District investigation and evaluation. If a change is proposed as to scope of work or price because of materially different conditions, any change must be accomplished in accordance with Section 14(c) of the contracts which requires written School Board approval.

8. The School District is entitled generally to summary judgment on the Rush School "overspray" claims because there was failure on

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defendant's part to comply with the procedures of Section 16(c) of the contract requiring School Board approval of any change in scope of work or contract price occasioned by discovery of conditions not allegedly reasonably anticipated. Fundamentally, however, the contract documents specify that ACMAT assumed responsibility for "ascertaining the nature and location of the work and the general and local conditions which can affect the work or costs thereof", and further, that defendant's failure to ascertain what was entailed in performing the contracted work could not be visited upon the School District but would be the contractor's "responsibility for successfully performing...without additional expense to the School District." To the same effect, *see Nether Providence Township School Authority, supra*. Prior to bidding, ACMAT had the opportunity to remove the ceiling tiles and make whatever inspection it deemed necessary. Alternatively, ACMAT could have attempted to negotiate a reservation of rights clause for conditions which are not observable. The contractor also had the option of not performing the work and thereby causing the dispute to be limited to one of contract interpretation. To permit a contractor to claim belatedly that it could not discover the scope of the work through pre-bid inspection, and without more, to collect for work not approved as an "extra", would nullify the contract provisions controlling bidding and performance and undermine the fiscal authority and responsibility of the public contracting body.

9. The Henry A. Nozko Affidavit pertaining to the Rush School has no probative value for opposition to the summary judgment motion. It is not based upon personal knowledge that a reasonable investigation of the site could not have been made. Moreover, there is no evidence that ACMAT was prevented by any action of the School District in making its own inspection. On the contrary, there

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is undisputed evidence that ACMAT was not impeded by School District action. According to ACMAT, it was advised, prebid, that there was asbestos above the ceilings of the second floor of the school. It was also advised that, prior to bidding, it could inform itself of the nature of the job by an earnest inspection, that is, by looking beyond the ceiling tiles, or accept the risk of a lesser examination. It chose the latter course.

10. Work directed to be undertaken by ACMAT on a time and material basis was subject, by contract language, to the School District's final determination as to net costs of labor and material. Thus, the claims for time and material costs are not subject to judicial review. The School District's contractual right of final determination necessarily includes the form and extent of proof and actual expenditures by the contractor. However, the court can decide whether there was written authorization from the School District to ACMAT to undertake work on a time and material basis.

11. ACMAT's claim for delay damages is barred by the specific language of the written contracts.

12. *Derry Township School District v. Suburban Roofing*, 102 Pa. Commw. 54, 517 A.2d 255 (1986) is not applicable. It is not an "extra work order" case.

13. ACMAT understood and agreed that with regard to any claims for extra work in the performance of the contract, it had to propose why the work should be considered outside the scope of the agreement, specify a lump sum amount if no unit price was specified, provide detailed support for the proposal for School District review and await approval or disapproval before doing the work.

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14. Where it was agreed that the work was extra to the contract, but the School District and ACMAT could not agree on a lump sum price, ACMAT was to perform the work on a time and material basis plus 15% with the School District determining the net cost of time and material under the contract.

15. With these criteria, the court now proceeds to consider separately each aspect of ACMAT's claim under the summary judgment standard of review.

16. The Rush School

(a) Item 1. *Decontamination of Building Contents.* The School District directed ACMAT to perform certain work on a time and material basis. A change order issued. ACMAT claimed \$148,398.22. The School Board approved \$63,282.89 of the claim as the reasonable value for the work based upon its review of invoices submitted. ACMAT continues to claim \$85,115.33, yet it executed the change order on May 10, 1985, acknowledging that the School District would be obligated to pay \$63,282.89 for the work. It cannot now claim more.

(b) Item 2. *Teachers' Closets and Boxed Rail for Folding Partition.* ACMAT hung two layers of polyethylene on the walls which sealed off built-in lockers, cabinets, shelves, and closets. It then removed asbestos containing fireproofing from structural steel beams in the classrooms on the second floor. Then, it proceeded to clean up the second floor area. After this work was done, but before the School District approved the work site as having been completed, the School District notified ACMAT that it was necessary to remove asbestos from a steel beam that ran through the area above the closets and between the wall and the flush sheet metal panels over the doors on the closets' face. Removal of this asbestos

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was part of the original contract for removal of asbestos containing spray-on fireproofing from structural steel beams. Removal of this asbestos was not approved by the School Board as an "extra".

Although ACMAT had to cover over the cabinets to do the required work and had twice to clean up the second floor area, the work was occasioned by its own contractual undertaking, which included correcting its own omissions and mistakes. ACMAT's claim of \$291,711.36 fails as a matter of law.

The School District did advise that removal of the *bottom* shelf of the metal closets to clean out original construction asbestos material would be considered extra work. ACMAT was asked to submit a quote for this work, but it never did.

ACMAT has not broken out this part of the claim. Although the School Board is not obligated to pay ACMAT unless the contractor had obtained approval of a price for the extra work, it stands ready to pay \$388.52 as calculated from field reports. Since there is no dispute that this work was done, I will allow the claim to the extent of \$388.52.

(c) *Item 3. Work Regarding Light Fixtures.* ACMAT claims \$51,297.23 for the removal and disposal of some light fixtures and the dismantling, cleaning and reassembling of other light fixtures. These fixtures had been covered with asbestos spray-on fireproofing. ACMAT was required by contract to wrap and seal all light fixtures prior to asbestos removal. Certain of these fixtures were determined unable to be cleaned and were designated for disposal. Those discarded did not have to be wrapped. ACMAT was authorized to replace fixtures on a time and material basis. However, ACMAT does not claim that it furnished or installed new fixtures and the School District contends it did not. Therefore, there is no

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material dispute. ACMAT did, in this regard, only that which was required by its contract. Accordingly, this claim is denied.

(d) *Item 4. Work Regarding Access in Platform Area.* The School District agreed that gaining access to a beam in the area of the leading dock was extra work because it had to be accessed from outside the building. This work was agreed to be paid on a time and material basis. However, it was made clear that removal of the asbestos was part of the contract. ACMAT claims \$4,843.05 for this work. The School District claims the reasonable value is \$4,583.92. Although the School Board now claims that ACMAT should have discovered this condition in its inspection, the acknowledgement of the work as an "extra" by the School District caused ACMAT to rely upon that assessment and to forego any contest as to whether it was within or without the contract. Finding that the School District is the final arbiter of the value of this work which it authorized, I find no material dispute that the work was done and, accordingly, ACMAT is due \$4,583.92 on this claim.

(e) *Item 5. Removal of Enclosures for Access to Beams and Removal of Encapsulated Asbestos.* ACMAT claims for the costs of removing enclosures for access to beams and removal of encapsulated as opposed to unencapsulated asbestos behind those enclosures on the first floor. ACMAT claims for moving furniture and removing and disposing of steel stud frame work and gypsum board enclosures that completely encased the steel beams. The School District advised that removal of encapsulated asbestos in various rooms on the first floor would involve an extra to the contract. However, ACMAT never submitted a proposal for the work as was required. Therefore, the actual work and price were never agreed to or approved by the School District or School Board and there was no obligation to pay. However, since work was done,

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and the Board would have authorized some amount, the court is required to accept the School Board's determination of the net cost of time and material and awards that amount to ACMAT, that is, \$22,576.00. The balance of the claim of \$41,538.65 is denied because it was not approved as a contractual sum to be paid.

(f) Item 6. *Perimeter Soffit Removal and Replacement*. ACMAT removed and disposed of insulation board around the perimeter of soffit on the second floor and supplied an installed new insulation board. This was authorized by the School District on a time and material basis. Although it contends that ACMAT never obtained proper School Board approval, I find that ACMAT was authorized to proceed on a time and material basis under the contract with the School Board having the right to determine the fair value for the work. On that basis ACMAT is owed \$7,419.99 of its claim of \$14,853.25.

(g) Item 7. *Work Above Metal Ceiling in Room 130*. ACMAT claims \$2,524.53 for working above and around the metal ceilings in this room. Although the School District recognized the *possibility* that there would be an unanticipated degree of difficulty in gaining access to the asbestos covered ceiling beam, ACMAT was not authorized to proceed on a time and material basis and it did not submit a proposal that the work was an "extra" and propose a price. Therefore, the School Board was not obligated to pay. However, the work was done. ACMAT's contention that there was unanticipated difficulty is undisputed. Therefore, this claim proceeded on a time and material basis. The School District's calculation of \$1,839.31 as reasonable is awarded.

(h) Item 8. *Removal and Replacement of Drywall Ceilings in Locker Rooms*. This was work approved by the School District to

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be done on a time and material basis. ACMAT failed to observe that there was a drywall ceiling on the first floor. It bid the work based upon its erroneous belief that there was a lay-in grid ceiling on the first floor and here. The School District calculated the reasonable costs for installation of the drywall ceiling to be \$25,517.28. Since ACMAT's bid anticipated a cost of \$6,700, per School District calculations, for a lay-in ceiling, assuming School Board approval had been obtained, \$18,817.28 would be allowed. Since ACMAT actually installed a drywall ceiling on the first floor and since that replacement was authorized, the sum calculated by the School District will be ordered paid. The balance of the claim of \$58,531.71 is disallowed because ACMAT never obtained approval of this amount as a contractual sum and agreed by working on a time and material basis that the School Board would determine the sum to be paid.

(i) *Item 9. Removal and Disposal of Carpeting.* This work was approved as an extra. However, work that was to be done was deleted from the original contract and it is not disputed that ACMAT has not given a credit for not protecting and shampooing this carpet as was the understanding between the parties. According to the School Board's time and material calculations, ACMAT is entitled to no payment because of the agreed set-off and may be obligated to pay back \$12,140.50.

(j) *Item 10. Removal and Disposal of Transite Panels.* ACMAT claims for removal of these panels in the gymnasium and shop areas as work not referenced in the specifications for the job. The complete removal of the transite soffit closure and the replacement with 1/2 inch sheetrock were approved by the School District. Of the \$4,772.80 claimed, the School District would allow \$3,335.20 and that amount is awarded.

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(k) Item 11. *Labor Working Above Plaster Ceiling.* ACMAT claims as extra work the labor cost of working above plaster ceilings in the locker rooms, auditorium, cafeteria and first floor corridor. The School District agreed to pay for this work as an extra if it was the contractor's proposal or the owner's counterproposal, or some modification of either was approved. In any event, the contractor was apprised of the method for submitting the proposal to claim for extra work. That method was not followed. However, since certain work was performed which would have been approved by the School District, it will be treated here as performed on a time and material basis. The School District's calculations of the value is \$6,293.94. That amount is awarded as opposed to ACMAT's claim of \$54,960.89.

(l) Item 12. *Removal of Overspray.* This claim has been addressed in paragraphs 8 and 9. The claim for \$605,501.07 is rejected.

(m) Item 13. *Extra Work Done to More Area on First Floor.* ACMAT bid work on the first floor using the second floor as a model in negotiations with the School District. It was agreed between the parties that "[t]o the extent that there [was] a substantial difference in the quantity of asbestos to be removed or in the nature of the asbestos to be removed, an extra or credit would be given depending upon whether the quantity of the work was greater or lesser or the nature of the asbestos differed." Brazil Letter dated November 21, 1984, p.2. ACMAT has made no showing that a significantly greater quantity of asbestos was removed. There is no essential relationship between floor area and labor costs. The claim for \$20,778.57 is denied.

(n) Item 14. *Masonry Block and Sealing Work.* ACMAT makes claims for the work of hammering, chiseling, removing and

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disposing of cement block, and the purchasing of block, caulking materials and masonry items. It also makes claims for replacing or completing block walls, patching masonry and various caulking activities which it attributes to the masonry trade. This was not work approved as an extra. It was, however, work required to be done by ACMAT's contractual undertaking to proceed on an "alternate method of control which shall not exceed the base bid." The claim of \$34,206.08 is denied.

(o) Item 15. *Labor Costs of Working Above and Around Shop Machines.* ACMAT claims for the labor costs of working around, protecting and cleaning large equipment in the shop rooms on the first floor. It claims \$178,767.05. The School Board disclaims because the equipment was obvious and the contractor was not relieved of the obligation to inspect and to include in his bid the cost of dealing with that which was seen or knowable. The School District is correct. It never agreed to treat this work as an extra and it is not disputed that these machines were visible and the duty of inspection was incorporated into the contract for work on the first floor. Accordingly, this claim is denied.

(p) Item 16. *Cost of Staging in Music Area.* ACMAT sues for the cost of furnishing, erecting, dismantling and disposing of timber scaffolding in the music room which embraced several floor levels. This claim for \$9,489.35 is rejected because it represents an obvious condition which was known to ACMAT when it bid the work. Moreover, there is no essential relationship between area and quantity or nature of asbestos removed.

(q) Item 17. *Cost for Working in Elevator Shaft.* The School District regarded part of this work as within the scope of the contract and part as an extra. No agreement was reached as to the cost.

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Therefore, the removal work was approved and undertaken on a time and material basis. The School District has determined that \$4,063.50 of the \$10,532.51 sought is reasonable and would have been approved. Therefore, that amount is awarded to ACMAT.

(r) Item 18. *Labor Due to Lack of Heat*. ACMAT claims for loss of productivity due to lack of heat during the winter months. The School District disclaims on the basis that these were conditions of the contractor's own making by failing to complete the contract by the agreed deadline, which would have been in the Fall, and by failing to enclose and heat the property so as to protect it. This claim is barred by paragraph 15(c) of the original contract, General Conditions. The claim for \$85,651.15 is denied.

(s) Item 19. *Freeze, Damage and Contamination*. This claim for \$36,195.11 follows upon that asserted in Item 18. The same ruling applies. The claim is denied.

(t) Item 20. *Additional Contamination After Encapsulation*. This is a claim for decontaminating learning materials in the Science Area. The materials included microscopes. ACMAT claims \$40,809.41. There was School District direction to perform this work on a time and material basis. The reasonable value for the work has been determined by the School District to be \$3,333.72. That which is claimed as costs of re-cleaning an area is denied. There was no approval of this item as an extra or to be performed on a time and material basis. Accordingly, \$3,333.72 is awarded.

(u) Item 21. *Additional Barriers*. This claim is for \$12,358.18 attributed to an alleged requirement to have three, not two, layers of plastic sheeting on the walls. There is no evidence that ACMAT was required to install a third layer as an owner-approved "extra." Therefore, this claim is denied.

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(v) Item 22. *Cleaning Inside Univents*. This was work required under the contract. Further, there was no approval that it be performed as an extra. The claim for \$17,199.50 is denied.

(w) Item 23. *Removing and Replacing Ceiling Grid*. This claim of \$180,432.21 is denied because it was not work that was authorized as an "extra" by any School District representation whether on a lump sum or time and materials basis.

(x) Item 24. *Removal of Metal Pan Ceiling*. This ceiling work occurred in the dishwashing, faculty dining and serving areas. The undisputed evidence shows that ACMAT's contract included this work and it is not entitled to \$11,303.60. The School District claims a credit of \$4,915.00 because allegedly ACMAT did not install the ceiling in the kitchen areas.

(y) Item 25. *Removal and Disposal of Cafeteria Items*. This work was approved as an "extra." It was done on a time and material basis. The fair value as determined by the School District's \$2,214.30 and that amount is awarded.

(z) Item 26. *Removal of Furniture from Chair and Office Storage Area*. There is no evidence to support this claim of \$4,522.44 as an owner approved "extra." It is denied.

(aa) Item 27. *Claim for Recleaning and Over Inspection*. There is no evidence that this \$26,896.26 claim was an owner-approved "extra," or lump sum or approved on a time and material basis. It is denied.

(bb) Item 28. *Labor of Working Above Lockers in Locker Room*. ACMAT claims for the cost of covering and protecting lockers on the first floor and for working around these obstructions since there were no lockers on the second floor. This claim for \$26,476.14 must

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be denied because a general inspection disclosed this as within the scope of the bid and there was no side agreement to compensate as "extra" for every difference between the first and second floor; rather, only if there was proof of a substantially different quantity of asbestos to be removed.

(cc) Item 29. *Removal of Plaster Wall, Room 133.* This involved the sealing of a plaster partition. ACMAT purchased and installed gypsum board and taped the joints. This work was approved as an "extra" on a time and material basis. Of the \$609.03, \$533.12 would be approved. Accordingly, that amount is awarded.

(dd) Item 30. *Extra Cost of Decadex.* This was approved by the School District. The claim of \$13,851.95 is substantiated and awarded.

(ee) Item 31. *Electricity.* This claim of \$10,040.30 is substantiated by the language of the contract and \$10,040.30 is awarded.

(ff) Item 32. *Extended Duration Expenses.* This claim of \$1,060,800.00 is not substantiated as an approved "extra." It is barred, in any event, by paragraph 15(c) of the contract.

17. The Fairhill School

(a) Item 1. *Encapsulation of Sealer at Soffits.* This claim is denied because there is no evidence that this was agreed to be "extra" work or that ACMAT could bill for it as an approved "extra." It appears that it was work that was part of an \$18,000 change order.

(b) Item 2. *Furnishing and Installing Ceiling Grid for Acoustical Tile.* The contract required ACMAT to replace damaged or missing sections of the grid as part of the contract price. The claim for \$68,000 must be rejected.

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(c) Item 3. *Removing, Cutting Up and Disposing of Old Ceiling Grid.* This claim for \$85,000 is denied because there is no evidence that this was an agreed "extra." Rather, there is undisputed evidence that the operation (choice of clean or replace) was within the contractual commitments of ACMAT.

(d) Item 4. *Removing Carpeting and Scraping Carpet Glue.* Specifically, ACMAT claims for the cost of having to cut up the removed carpet in pieces that would fit into the asbestos disposal bags. However, the documentation shows that this was work undertaken as part of the \$18,000 Change Order. The proffered ACMAT documentation on the score pertains to the Rush School, not Fairhill. The ACMAT claim for \$185,000 is, therefore, denied.

The School District claims a credit of \$19,990.89 because ACMAT did not have to protect and shampoo the carpet already removed. This credit claim is denied because the Change Order was incorporated into the primary contract and must be read as an agreed add-on to the original price and, simultaneously, a nullification of any conflicting requirements therein.

(e) Item 5. *Electricity.* ACMAT claims that the School District failed to provide the electricity required to operate the microtraps, even though the contract provided that the owner would supply *all* electricity for construction under the contract. It claims \$10,000. The School District offers no evidence that modifies the contractual undertaking or quarrels with the charge for supplying alternate sources of electricity. ACMAT is awarded \$10,000.

(f) Item 6. *Adjustments Concerning Overtime, Disruptions, Delays and Acceleration.* ACMAT claims \$203,440 for delays occasioned by late test reports. This claim is denied because it amounts to a claim for delay and negligence.

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(g) Item 7. *Inability to Use Elevators*. This claim is denied because there was no agreement that this was an "extra." There is an exclusion for School Board liability in the underlying agreement for unforeseen causes for delay and there is no contention that this item was foreseeable. The claim for \$36,400 is denied.

(h) Item 8. *Claims Attributed to Defective Specifications, Over Inspection and Recleaning*. This claim for \$500,000 is denied. ACMAT was required to perform according to the Work Practices Supplement which it accepted. There is no evidence of this being agreed-upon extra work.

(i) Item 9. *Application of Second Coat of Wax*. This claim for \$2,400 is denied because there is no evidence that this was authorized as "extra" work. Furthermore, it was required to be done under the contract provisions.

(j) Item 10. *Troughs Above Closets*. ACMAT claims \$16,800 for covering 23 troughs above closets with polyethylene. This claim is denied because it was work within the scope of the agreed work. There is no evidence that this was agreed upon as "extra work." ACMAT's Exhibit B-10 refers to the Rush School, not Fairhill.

(k) Item 11. *Full-Face Powered Air Respirators, Type B, Worn by ACMAT Workers*. This claim for \$184,559 is denied. ACMAT had the responsibility of providing whatever minimum equipment was required by prevailing circumstances or contract to protect its own workers. There is no evidence that the School District agreed to this expense as an "extra."

(l) Item 12. *Additional Air Monitoring*. ACMAT claims \$34,500 which it had to pay to its independent air monitoring contractor for

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being at Fairhill longer than originally scheduled. This is a claim for delay which is contractually barred.

(m) Item 13. *Extended Duration Expenses*. This claim of \$110,086 also amounts to a claim for delay and is barred.

18. The Lincoln School

(a) Item 1. *Asbestos Removal in Back Rooms, Toilets and Cafeteria*. This work was authorized by the School District to be done as an extra on a time and material basis per the handwritten ACMAT proposal, except for the work in the faculty lunchroom. ACMAT B-37. ACMAT had attributed \$4,800 of its proposed lump sum of \$78,100 to do that work. The School District's response is that the \$78,100 was excessive for the work done. Certainly, the claim of \$257,962.00 should be regarded as excessive. I find that \$78,100 less \$4,800 is an appropriate award, that is, \$73,300.

(b) Item 2. *Relocation of Decontamination Chamber*. ACMAT claims \$17,838. Relocation of the chamber was necessary to allow students access and to comply with fire and safety codes. This cost was not an agreed "extra" and is denied.

(c) Item 3. *Removal of Asbestos at Ceiling Level and at Steel Around Motor Equipment and at Ceiling Line at Bi-Fold Door*. The claim is for \$6,086.00. There is no written approval for this work as an "extra." Therefore, the School Board had no authority to pay. However, since the School District acknowledges that certain of the work done would have qualified as an approved "extra," \$1,132.74 is awarded as a time and material undertaking.

(d) Item 4. *Lost Production*. This \$12,000 claim is a delay claim which is contractually barred.

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(e) Item 5. *Work Stoppage*. This claim for \$15,000 is contractually barred.

(f) Item 6. *Full Face Powered Air Respirators*. This claim for \$78,012 cannot be asserted. See ¶ 14(i), above. This is a delay claim, in essence, and is barred.

(g) Item 7. *Installation of Extra Covering*. This claim for \$660 is denied because there is no written authorization for this to be considered an extra expense. Contractually, ACMAT was required to enclose totally and adequately the work areas.

(h) Item 8. *Overtime, Disruptions, Delays and Acceleration*. This claim for \$94,045 is barred as a delay claim. The School District contractually is not bound by oral directions by its employees which would obligate it financially and ACMAT cannot here proceed on a theory of negligence.

(i) Item 9. *Electricity*. This claim for electricity is founded on the contract and \$10,000 is awarded.

(j) Item 10. *Cleaning and Recleaning*. This claim for \$400,000 cannot be asserted as there is no evidence that the School District authorized this as "extra" work or expense.

(k) Item 11. *Extended Duration*. This claim of \$59,916 is a delay claim that must be denied.

19. In accordance with the foregoing, ACMAT is entitled to credits against the School District's counterclaim amounts, if any are proven, of \$99,291.05 from the Rush School, \$10,000.00 from the Fairhill School, and \$94,432.74 from the Lincoln School, for a total of \$203,723.79.

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BY THE COURT:

Signature
James T. Giles/J.

12-23-88

cc: R.A. Korn

S.J. O'Brien

P.S. Miller

J.J. Hatzell

S. Akan

A.L. Dennis

J.M. Heley

**APPENDIX D—TRANSCRIPT AND DECISION ISSUED
FROM THE BENCH BY THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA ON PETITIONER'S
MOTION FOR REARGUMENT
IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

ACMAT CORP.

v.

SCHOOL DISTRICT OF PHILA.

CIVIL ACTION NO. 85-7067

Philadelphia, Pennsylvania

June 30, 1989

HEARING

**BEFORE THE HONORABLE JAMES T. GILES, J.
UNITED STATES DISTRICT COURT JUDGE**

APPEARANCES:

For the Plaintiff:

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and

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(Proceedings recorded by Electronic Sound Recording;
transcript produced by transcription service.)

(Whereupon the following occurred in open court:)

THE COURT: Good Morning.

ALL COUNSEL: Good Morning, your Honor.

THE COURT: Please be seated. State your appearances for the record, please.

MR. DINEEN: Joseph Dineen for the plaintiff, Acmat Corporation.

MR. STEIN: Edward Stein for Acmat Corporation.

MR. LEVIN: Jay Levin also for Acmat, your Honor.

MR. DENNIS: Andre Dennis for the School District of Philadelphia.

MS. SHAFFNER: And Paula Shaffner for the School District of Philadelphia.

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THE COURT: I promised to hear you with respect to your contention, Acmat's contention, that I should reconsider the prior ruling granting in part each of the parties' cross-motions for partial summary judgment.

I will consider Acmat's motion for reconsideration as essentially a motion for leave to contend at this point that there should be reconsideration. That is, is there something major that's new raised which, as a matter of fairness, should require the opening of the record or a recasting of the order? Is there anything to be added to Acmat's written submissions?

MR. STEIN: Your Honor, may I address the Court on that question?

THE COURT: Yes.

MR. STEIN: Well, as your Honor knows, the present firm representing Acmat substituted for the Korn, Kline & Kutner firm after your initial order was entered. At that time, we reviewed the files, reviewed the case and decided that a motion for re-argument was in order.

At that time we were able to find Fred Dalton whose affidavit is now before you and who is no longer an employee of Acmat Corporation. It was Mr. Dalton who conducted or who was present at the prebid meeting and was also part of the group who went on prebid inspections. This is, I think, a rather — I think he brought quite a bit to bear on the issues factually.

Mr. Nosco's (ph.) affidavit, while he presented one before you initially, he now explained those matters of which he had personal knowledge and I think that that certainly is worthy of consideration by the Court.

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I'd just like to elaborate a little bit on the papers which are already before you and, in particular, Article 14 of the Rush contract, which appears in identical form in the Fairhill and the Lincoln contracts, although its number might change.

And, your Honor, for the convenience of the Court and all concerned I brought some copies of Article 14 on one, on a single page, and with your permission I'd like to hand it up to the bench at this time and to my adversaries.

(Pause.)

MR. STEIN: In reading Article 14 I think it's important to point out some of the subtle distinctions that exist there and the use of language employed by the School District who was the draftsman of this agreement.

In particular, I think it's important to understand the distinction between the word "cost" under equitable adjustment and the use of the phrase "contract price", because there's really three things they talk about here: contract price, equitable adjustments and then we see an increase or decrease in compensation talked about in Paragraph B. I think it's significant that they didn't use the same phrases or the same words throughout Article 14.

Well, first of all, 14-A, it is Acmat's contention, deals with those situations where the School District may order unilateral changes that are within the scope of the contract. This is a little different from most contracts that we face, that usually a modification requires a sentence. But because this is a construction contract, because large sums of money are committed to it and because people realize that you can't plan for all contingencies, an owner such as the School

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District reserves itself the right to make unilateral changes to the contract. And that is what 14-A is intended for.

And if the School District which — now, if I may just proceed on another tack — there are two claims that Acmat asserts that arise under 14-A, both of which had School Board approval. The first one was the change order to the Rush School contract which added personal property. That had School Board approval, the School District sent out what they call a change order, trying to get Acmat to agree to a lump sum adjustment in the price.

Acmat sent it back with words reserving its right to seek additional compensation. The School District crossed it out and said look, this is what you're getting, we have that right under the contract. I'll explore that issue concerning the School District's right in just a moment.

THE COURT: Did Acmat then sign it?

MR. STEIN: Acmat signed it, your Honor, with the words of reservation and sent it back to the School District who unilaterally crossed out the wording and signed it themselves. I don't see how there could be a meeting of minds with respect to the amount.

THE COURT: Well, was the work then performed by Acmat under the conditions of the document as it was revised?

MR. STEIN: Acmat performed the work in accordance with 14-A. It had no choice but to do the work that the School District unilaterally ordered it to do and it reserved its right to seek an equitable adjustment and not a change in contract price.

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Now, that's the first item for which we seek damages under 14-A. The second one has to do with the Fairhill work practices supplement.

THE COURT: Now, just a minute. All right, go ahead.

MR. STEIN: Thank you. Apparently after the contract was entered into the School District decided they wanted Acmat to perform their work in accordance with what has been called this work practices supplement and the issue was put to the School Board. The School Board approved it, Acmat was sent a copy of the work practices supplement with a cover letter, saying that the School Board has approved it. And there are other documents in the file which also indicate the same.

Well, Acmat went ahead and performed that work, but there was no documentation showing that it ever agreed to a lump sum price of \$18,000 or any other amount. What the documentation shows is that Acmat gave an estimate to the School District to put some encapsulating sealer, I think it was, up at the soffits. But it wasn't for that work practices supplement which goes on page after page of additional work that has to be done under that agreement.

But that had School Board approval, Acmat was directed to do it under 14-A, but there was no agreement as to contract price.

So those are the two claims that come under 14-A. Acmat had no choice, it had to do the work.

We now come to the question of what does Acmat get paid for that work. And 14-A begins to talk about it and then it's explained in Paragraph 14-B. First of all, 14-A says if there is an increase or decrease in the contractor's costs, and those are important words, they will receive an equitable adjustment. And then it goes on to say

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that a change in contract price shall be subject to approval by the Board.

What are we talking about here? Why are we using different phrases? It's because an equitable adjustment, while it could result in an increase in compensation, is not a change in contract price. Contract price, just as was the case when they initially entered into the contract, is a lump sum, is a lump sum agreement.

THE COURT: Well, how do you overlook the phrase "Any such change in contract price?"

MR. STEIN: That does not refer back —

THE COURT: It refers to —

MR. STEIN: — to equitable adjustment, your Honor. And in fact, indeed, they talk about approval by the Board and they talk about lump sum mutually agreed upon.

THE COURT: Well, what does such change in contract price refer to? It has to refer to something that has gone before.

MR. STEIN: It —

THE COURT: And that which has gone before is equitable adjustment.

MR. STEIN: Well, I can't say, I don't understand. Maybe we could have the draftsman here, but I certainly don't think it's clear and I don't understand why they changed the phrases here from equitable adjustment, which is a term of art in construction, to contract price.

And when you look at B, which is —

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THE COURT: Well, this particular contract and as I read it, any such change refers back to equitable adjustment. And equitable adjustment is contractor's cost.

MR. STEIN: Well, if we go on to B, I think it helps to clarify the issue.

THE COURT: Okay.

MR. STEIN: Now, B begins by talking about increases and decreases in compensation and that's going to be done one of three ways: Number one, unit prices, if they're available and applicable. Well, none of the claims involve unit prices, so that's gone. When that's not available, you go to Step 2, you try to make a mutual agreement with the Board.

THE COURT: Well, there were certain unit prices.

MR. STEIN: I don't believe that they were —

THE COURT: The unit prices with respect to labor, for example.

MR. STEIN: I don't think that those unit prices apply to the particular claims in this case, your Honor. I certainly don't think that the School District referred to unit prices in the contract.

THE COURT: Well, all right. But looking at the way in which claims were submitted, there were certain claims for labor.

MR. STEIN: Your Honor —

THE COURT: But part of the problem was that Acmat failed to submit documentation satisfactory to the School Board with respect to its costs

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MR. STEIN But —

THE COURT: — for which it sought equitable adjustments.

MR. STEIN: Well, you know, Judge, I have a feeling that there is no documentation that would have been satisfactory to the School Board on this case.

THE COURT: Well —

MR. STEIN: And furthermore, the contract, which I think would govern an issue like this —

THE COURT: All right, so —

MR. STEIN: — is silent on that question.

THE COURT: — what are you saying? You're saying that the contractor would not have to submit a detail of the time and materials which it actually expended in order to justify its claim for an equitable adjustment? They could just pick a lump sum out of the air and say this is what we think is fair and just?

MR. STEIN: You know, Judge —

THE COURT: Let's go to the court?

MR. STEIN: You know, Judge, Acmat did everything they could. There are three volumes entitled "Equitable Adjustment," which were submitted to the School Board, I think it was 1985 or 1986, detailing everything.

THE COURT: Okay, let's go ahead.

MR. STEIN: Thank you.

THE COURT: You say unit price is not applicable —

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MR. STEIN: If they're not applicable —

THE COURT: — and that then we deal with an attempt to get a lump sum agreement?

MR. STEIN: Exactly, Judge, we try to make a deal. And that is precisely what happened with the change order on the Rush contract that I spoke about earlier.

The School Board — School District tried to make a deal, with School Board approval, for \$63,000.

THE COURT: Now, if the parties can't reach a lump sum agreement, then what?

MR. STEIN: Okay, Judge, that's where we are. We increase the compensation by way of an equitable adjustment. Equitable adjustment is not contract price, although it may result in an increase in compensation.

THE COURT: It says by the actual net cost in labor and materials plus 15 percent for profit and overhead.

MR. STEIN: That's right, Judge, actual net cost plus 15 percent as markup or, as it says here, profit and overhead. Now, the rub seems to be the last sentence here, which now the School Board is out of it altogether when you price it this way, it says the School District makes the final determination.

Now, Judge, we cite in our papers the Supreme Court case of *Teodori* — I'm sorry — *John F. Harkins Co. v. The School District of Philadelphia*, 1983, and this comes out of the appellate — the Superior Court, your Honor.

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THE COURT: I've read that case. That case does not say that this kind of phrase is unconstitutional. In fact, either that case or another case you cited, the references that a contract did provide, the School District would be the final arbiter of net cost.

MR. STEIN: Judge, let's take a look at that paragraph as it's written. I think you'll find —

THE COURT: Which paragraph? In the case or here?

MR. STEIN: I think you'll find that doesn't say that. Judge, my papers cite it in full, I think, or most of it, and I have the case in front of me right now. It will just take a minute, I'm not going to read the whole thing.

THE COURT: Just take a minute.

MR. STEIN: Okay. It's the operative parts I think we ought to talk about. Okay, in the first place, it says, the School District was to be the final arbiter of a contractor's net cost. Well, if you stop right there, I guess we lose.

THE COURT: Just go on and read it. I've read it.

MR. STEIN: Okay, and by the way, in the first place means —

THE COURT: Just read it.

MR. STEIN: Okay. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor. And a trial was held in which the contractor tried to prove that it had suffered additional damages. They were not barred from being able to prove damages. They failed

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to carry their burden of proof. They went on a theory of law that the Court wouldn't accept.

Had they presented the evidence differently, they might have won the day. But that contract language did not preclude that contractor for the School District of Philadelphia from going forward and our State Appellate Court —

THE COURT: Was the issue raised?

MR. STEIN: Your Honor, this is an interpretation.

THE COURT: I know, but was the issue raised? Either in that case or another case, the Superior Court expressed a bit of chagrin with the fact that somehow the case got to the Court of Common Pleas and an arbitration provision that was applicable had not been raised as a defense by the School District. That was that particular contract, I'm not sure of this *Harkins* case or some other case that you cited.

But the point is that the Superior Court gets the case in the posture procedurally in which it comes up from the Court of Common Pleas. I have the issue raised squarely before me and it's not evident to me that the School District raised that issue, that is that it was the final arbiter of this matter in that case. The case was in the Court of Common Pleas and the Court of Common Pleas assumed it had jurisdiction because jurisdiction was not contested and it applied an interpretation to the matter as it was pending before it, that is to try to determine if the contractor's theory of claim made sense, and it rejected it. Or at least it gave the contractor an award on a theory that the Superior Court or the Supreme Court of Philadelphia declared as not right and proper.

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But I have not found a case that says that where the school district is the final arbiter of the net costs of labor and material, that that is unconstitutional.

MR. STEIN: Well, Judge, I think the *Abromovich* case that I also referred to —

THE COURT: Which one is that?

MR. STEIN: *Abromovich* I think was the first party in the case. It involved the Liquor Board. And it was also a situation there where a party to the contract sat as judge and jury. I think it was the appellate courts said no, they sent it back.

You see, Judge, I don't see how really under our system of jurisprudence while one party may try and take advantage of the other party by trying to have their will, that you can allow one party to adjudicate these claims. How can it be done, Judge? It would put us out of business.

THE COURT: You signed the agreement. Your client was not a destitute helpless individual. He wanted this contract, to be sure, but he didn't have to agree to these terms. It knew what it was signing at the time that it signed it.

MR. STEIN: Well, surely you realize, your Honor, in these municipal contracts the contractor signs these things in the form that it's presented to them.

THE COURT: I don't know that at all. The law presumes just the opposite.

MR. STEIN: But in any event, you know, thank goodness for the courts, don't allow people to take advantage of our citizens. When we see something like this, judges step in to correct a wrong.

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One party to an agreement should not be able to have their way in the manner in which the School District has tried to do so here.

And I might add, your Honor, you know, just look what happened here, or take abstract case. Somebody makes an agreement —

THE COURT: Let's not take an abstract case.

MR. STEIN: Let's talk about a small sum of money, let's talk about a couple of hundred thousand dollars. One party to the contract reserves itself the right to make unilateral changes in that agreement and then to also determine the final costs.

THE COURT: Of labor and materials?

MR. STEIN: Sure, Judge. Well, what do you have in an asbestos-removal contract? It's all labor and materials, mostly labor.

THE COURT: Now, are you saying that it's just and proper to charge up a jury every time there is some dispute over labor and materials?

MR. STEIN: You know, Judge, we did everything we could to avoid coming here to spend these —

THE COURT: I mean under your theoretical case.

MR. STEIN: Sure, Judge.

THE COURT: Well, let's suppose in a municipal contract there is a good faith dispute, the parties are \$15 apart. Are you saying that the Federal Court or a State Court would have to get involved in a jury trial every time the parties have such a dispute, that that would be just and proper and a good way to expend judicial resources?

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MR. STEIN: Well, I don't have to answer that question. The Legislature —

THE COURT: If the parties can't agree, then the School Board is — it says here — the final determiner of the net cost of labor and material. Why, I find that very practical. First of all, there should be a record of the labor and the materials. It should be observable. And it can be resolved because it is observable right there on the spot. And it cautions the contractor to make sure that it documents what it's doing and that it can justify through observance that which was done.

In my review of the documentation there were many instances where I observed that Acmat was diligent or dilatory relative to its documentation of labor. And the School Board, therefore, had to estimate what was a fair amount of time to allocate in the absence of Acmat's submissions of actual labor costs.

MR. STEIN: May I respond to that, Judge?

THE COURT: Yes.

MR. STEIN: First of all, you raised a question as to whether a contractor should be able to come into court, although even small sums of money like \$15. Well, luckily for me, I don't have to answer that because the Legislature already has. They have eliminated sovereign immunity from Governmental subdivisions such as the School Board from suits of this type.

Acmat, like any other citizen, is entitled to come to court and to press its claim for contract against the School District. So any concern that —

THE COURT: Does that apply to torts?

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MR. STEIN: Torts, we're — this is a contract case, Judge.

THE COURT: Yes, but does that apply to contract cases?

MR. STEIN: I think your order, Judge, indicates —

THE COURT: I thought you were talking about, you know, the waiver of sovereign immunity, the subdivision, political subdivision act, I thought, that applied to —

MR. STEIN: I'm talking about contract case, Judge.

THE COURT: Under that act?

MR. STEIN: I believe, I don't think there's any question that Acmat is entitled to press its claims for breach of contract.

THE COURT: Where? Under what act? You say the waiver of sovereign immunity relative to contract actions.

MR. STEIN: I don't think there is even a defense by the School District that they're not allowed to press that claim.

THE COURT: The contract is the source of your rights.

MR. STEIN: Is your Honor saying that sovereign immunity continues over claims such as this?

THE COURT: Where is the tort? You don't have a claim of tort. You have a claim that Acmat has contractual rights flowing from the agreement that were not observed by the School Board, and hence there is liability. I think you had some other claims, but they're not in the case —

MR. STEIN: Okay, I'd like to make some other points, Judge, and I promise to be brief.

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I'd like to take a look at Paragraph C. Now, Paragraph C is what we call a different site condition clause. This is where additional work is caused not by unilateral decisions by the School District, but by physical conditions at the site that make it more difficult to perform one's work.

I think the overspray condition at Rush is really a good example of that, but if I may, I just want to go down towards the end of the paragraph.

It says there any increase or decrease of cost.

Well, before you get there, you have to read the last prior to the preceding sentence.

MR. STEIN: Yes, Judge.

THE COURT: It, being the School District, shall make such changes in the drawings and/or specifications as it may find necessary.

MR. STEIN: And if it's not necessary to change drawings and specifications, you Honor, does that mean that there is no compensation for different site conditions? I think not.

When Acmat encountered the overspray, how were we going to change specifications and drawings? They had to continue with their work and do more of it, go feet and feet. How would one change a drawing to help them accomplish the overspray situation? So, your Honor —

THE COURT: Well —

MR. STEIN: —I really don't think it's fair to read that.

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THE COURT: In the case you cited there was specific architect approval of a change in manner of operation which, under that agreement, triggered the contractor's right to additional sums of money. So it is here, under C, that the School District has to determine, for C to be applicable, that the investigated conditions are materially different from those shown on the drawings or indicated in the specifications.

MR. STEIN: It's not the School District's decision, I don't think, to decide whether there are materially different site conditions. What happens is, and it happens in this case, Judge, they bring, they call the attention of the School District to this situation. They come out. And you know what the School District did in this Acmat case? They said, you know, go do the work, go do it. Now, it just didn't require, quite frankly, Judge, it just didn't require a change in plans and specifications, but they were brought there, their attention was drawn to it and they said: Go do it, Acmat.

And you know in Paragraph D — and this is something which was within the scope of the contract because it's provided for right there — it says they can give these verbal instructions.

THE COURT: "Shall not be binding upon the Board."

MR. STEIN: We didn't depart from the contract documents, Judge, we did what we were supposed to do.

THE COURT: It says "Verbal instructions given by any of the officers, agents or employees of the Board which depart from the contract documents shall not be binding upon the Board."

MR. STEIN: And if they don't depart from the contract documents, Judge, verbal instructions referring to different site conditions was contemplated. They thought they might encounter

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different site conditions, they provided for it in the contract and I submit to you that verbal instructions under that situation is permitted.

But, you know, we got letters that say: "Go do the work, Acmat," and Acmat memorialized it in writing. Now, what do we do about the costs of these different site conditions?

THE COURT: Well, first of all, are there different site conditions under the agreement?

MR. STEIN: I'm sorry, Judge? I didn't hear your last statement.

THE COURT: First, are there different site conditions which are cognizable under 14-C?

MR. STEIN: Well —

THE COURT: I mean, where in my order did I fail to treat that which was recognized by the School Board as being a different site condition?

MR. STEIN: But, see, the different site condition determination is for the Court and in this case, the trier of fact, which is a jury. The question as to whether there is a different site condition is something for — is a decision to be made by the citizens of the Commonwealth, it's for the trier of fact. It's not for the School District.

THE COURT: Okay.

MR. STEIN: If I may just finish up on this, Judge, with respect to the last sentence, it refers to increase or decrease of cost, and I think that's the operative language, and that takes us back into

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B, in which it says if you can't agree on a lump sum, then it's to be determined by the actual net cost in labor. I think that's a clear reference to the third tier set forth in Paragraph B.

THE COURT: Well, it's labor and material, plus 15 percent.

MR. STEIN: Right, Judge, labor and material, plus 15 percent.

THE COURT: Yes, with the School District being the final determiner.

MR. STEIN: Which it is our contention, Judge, is null and void, and I think that the *Harkness* case, other cases, have so held. I certainly have not seen any cases cited to the contrary.

Now, there's two other categories of claims. Now, 14-A deals with unilateral decisions, 14-C deals with different site condition claims. Another category of claims are simple breach of contract claims. It's really not unusual in a construction project for the owner and the contractor to disagree over an item as to whether it's in the scope of the contract.

They disagree, the contractor alleges a breach of the contract, you proceed under common law principles. We have that, we have that right here. Some of the claims that come within that are, for example, the over inspection claims. It's Acmat's contention they didn't employ the spec properly, they didn't enforce the specs properly. It has a right to do that and a reasonable — the question is, was it reasonable? That's for the trier of fact.

And finally, the last category of claims is delays. I know what the contract says about it, but even though that's what it says, the Courts have interpreted for me that that's not what was intended. It says it,

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that's not what it means. I've cited some cases for your consideration and I hope you'll look at it, and thank you very much.

THE COURT: Well, did you raise in your pleadings that any of the clauses of this contract were null and void as against public policy?

MR. STEIN: Well, I don't know, Judge.

THE COURT: Wouldn't you have to do that?

MR. STEIN: Sorry, Judge?

THE COURT: Wouldn't you have to plead that?

MR. STEIN: I'm not sure, I'm not sure if it's there or not.

THE COURT: Well, you may have to plead it.

MR. STEIN: Do I have to plead it?

THE COURT: Yes.

MR. STEIN: I think the law has already shown, these cases were decided a number of years ago.

THE COURT: Wouldn't you have to plead that certain provisions were null and void as against public policy as an affirmative defense?

MR. STEIN: Judge, plaintiff pleads facts —

THE COURT: Can you answer the question?

MR. STEIN: Yes, Judge. Plaintiff pleads the facts, it does not plead law, and that is what a complaint is intended to do. The argument that I've presented to you on this issue is one of law.

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THE COURT: So the answer is you don't know? The answer to my question is you don't know?

MR. STEIN: Judge, I don't know if the pleading says it, but I don't believe we have to state it.

THE COURT: All right, that's what I understood you to say, that you don't know.

MR. STEIN: Well, have I clarified that, Judge?

THE COURT: Yes, you don't know.

MR. STEIN: Well, Judge, maybe I didn't get it across.

THE COURT: You did, you don't know.

MR. STEIN: What I'm saying is whether —

THE COURT: All right, do you have anything to say on this issue?

MR. DENNIS: Just a few things, your Honor. First, with respect to whether the final arbiter clause is void as against public policy, I agree with the Court's observation of *Harkins*. It does not stand for that proposition. It indeed recognizes the validity of the final arbiter clause in a contract, indeed a contract quite similar to the contract before the Court.

Counsel makes the argument that another reason why the final arbiter clause should not be enforceable is because of the harsh nature of its result. However, this Court is well aware that the parties to contracts can waive certain rights. That is, one party may waive a right through a contractual relationship. And I submit to the Court that a waiver of right is certainly no more harsh and, indeed, perhaps, then I should say a waiver of a right could be construed as harsher

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than allowing the School District to be the final arbiter as is provided in this contract, and that is well recognized.

We don't have a situation here where one party is arguing a difference in economic status whereby the other — one party is overbearing as to the other party. We have two corporations — we have a corporation here, we have a public body in the School District and duress has not been raised in the pleadings and, indeed, it doesn't exist. And we believe that the final arbiter clause is enforceable and applies with respect to Paragraph 14.

But if I can go back one step further, you Honor, we also believe, as your Honor has noted in the briefs that we filed and in my most recent letter to the Court that I sent this week, that we believe the Court doesn't even have to reach this issue in terms of reconsideration, that the whole matter should have been resolved by the entry of summary judgment against Acmat on all of its claims and the Court did not have to reach the Paragraph 14 or final arbiter clause.

With respect to —

THE COURT: What do you say about the breach of contract contentions? That is, I don't have all my file here before me, but I believe these were raised before, breach of contract claims?

MR. DENNIS: There was a breach of contract claim stated in the Complaint. My position on the breach of contract claim, you Honor, is that the claim, since the amount it seeks does not have Board approval, would be barred because it doesn't have Board approval.

THE COURT: No, no, I'm talking about counsel referenced disputes about the scope of work.

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MR. DENNIS: Oh, different conditions?

THE COURT: No, scope of work, interpretation of the scope of work clause.

Let's suppose Acmat says Item A is not covered by the scope of work provision. The School District disagrees and says it is. Who is the final arbiter of that dispute, the Court or the contract?

MR. DENNIS: Well, in that dispute, you Honor, it seems to me that if Acmat says it isn't, then Acmat proceeds at its peril to do the work if the School Board says it is, because it doesn't have approval and Acmat always has the right to refuse to perform work that is not within the scope of the contract.

However, if Acmat proceeds to do the work in a situation where the School Board insists that it is, then I think Acmat proceeds at its peril and should not be compensated for that work.

THE COURT: Well, does Acmat have any realistic alternative but to proceed with the work?

MR. DENNIS: If it is correct in its position the realistic alternative is not to proceed until the matter is resolved either by approval from the School Board or to Acmat's satisfaction.

One illustration, for example, let's focus on the change order for Rush. We have a situation where a change order was actually executed by the Board. Acmat gets it — Acmat disagrees with the amount and instead of insisting that the matter be resolved at that point, proceeds to do the work and now seeks to hold the School Board responsible for an amount far in excess of the amount stated in the change order.

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Now, that is an example of a situation where if there is no meeting of the minds, Acmat didn't have to proceed. It cannot proceed and now come into court and try to hold the School District liable for more that it agreed to in the change order.

THE COURT: All right.

MR. DENNIS: With respect to the differing conditions clause, counsel submits that the jury determines whether there are different conditions and the contract specifically states that the School District shall investigate and make that determination.

Further, Acmat has failed to point to any notice to the School District or any contemporaneous notice that there was a differing condition, that the School District went in and investigated and either made or did not make a change. There are conditions that Acmat is to satisfy in order to take advantage of that clause or to try to take advantage of, that Acmat has not satisfied.

It may now not come in and bootstrap its claim for equitable adjustment, breach of contract, negligence, et cetera, by simply stating that there were differing conditions.

Also, as your Honor pointed out in the order, there was and there certainly is a provision in the contract which obligates Acmat to investigate.

One other item, your Honor. As I've pointed out again in my letter, in terms of the computation of the potential credits to Acmat, we believe there's a mathematical error.

THE COURT: I adopted those in an order.

MR. DINEEN: Okay, your Honor, if I may just for a moment, I understand your opening remarks prior to argument to be that you

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were treating this particular argument this morning as basically a prelude to a decision on your part whether you would consider granting leave for reconsideration. And it was my understanding, certainly, following the conference earlier this week which resulted in our coming down here to Philadelphia today, that it was your decision that you would entertain reconsideration and would, perhaps, take argument today if you felt that there were reasons to. And that was my understanding based on our conversation earlier this week. I just wanted to clarify that.

MR. STEIN: If I may, your Honor, I also remember being in chambers on April the 10th in which this issue came up. I have a very specific and vivid recollection and your Honor at that time indicated and granted our oral application for reargument and reconsideration.

THE COURT: That conference was held when?

MR. STEIN: April the 10th, your Honor. As a matter of fact, Judge, I specifically remember Mr. Dennis asking you if —

THE COURT: When did you get involved in this case?

MR. STEIN: It was shortly before then, your Honor.

THE COURT: What's shortly?

MR. STEIN: Pardon me, Judge?

THE COURT: What is shortly?

MR. STEIN: I think — counsel advises me that we were admitted pro hac vice shortly before that. I really don't remember, but —

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THE COURT: When were you involved with the investigation of this case on behalf of your client, not when you became admitted to speak her?

MR. STEIN: It was not long before that time, Judge.

THE COURT: Okay.

MR. STEIN: It certainly —

THE COURT: My determination is as follows: Nothing new has been raised in this motion for reconsideration that prompts me to consider it under any equitable provision waiving the timeliness requirements for the filing of such a motion for reconsideration. Nothing has been advanced which could not have been pressed before, assuming there was something that, indeed, was not pressed before by Mr. Korn.

Secondly, I find that everything that has been advanced here was, in fact, advanced by Mr. Korn, prior counsel. Existing counsel has said it in his own way, but Mr. Korn raised the same points. And each of the points was addressed by the Court previously.

No new light has been shed and there has been no demonstration of unfairness in the approach taken by the Court relative to its consideration of the Acmat claims. On the merits alternatively I reiterate my prior ruling. Nothing has been advanced here which shakes the logic of those matters ruled upon as they raised matters for legal determinations by this Court.

In a letter to me, the School District suggested that if I reconsidered the matter that I reconsider my rulings to the extent they were made in favor of Acmat where there was not specific School Board approval of certain items. For the reasons which I

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stated in the memorandum and order, I continue in my position that where the School District put in writing that certain additional costs were to be incurred by the contractor, that those writings were binding upon the Board because the School District was an agent of the Board and Paragraph 14-D is construed as a matter of law to say that written instructions which are in accordance with contract documents shall be binding upon the Board.

And as a matter of equity, where the School District in writing requires the contractor to proceed, to incur costs approved by the School District, that it cannot be said that the contractor is proceeding at its own peril.

With respect to the time and material provision, that is plain to me. It's actual net cost in labor and materials, those things which are observable, and the School District is the final determiner of that net cost. And that time and material provision comes into play where there is work that is done for which an equitable adjustment is to be made up or down. That is the way in which work that is outside of the scope of the contract is to be compensated.

I observed in my earlier ruling that where the contractor appreciates that School Board approval must be in writing for work beyond the scope of the contract, if it proceeds to do such work, it does so at its own peril, taking the risk that it will not be paid through recognition in writing by the School Board that that work is indeed an altered site work or that it requires an alteration in the drawings and specifications. Its alternative is not to do the work or to seek some judicial intervention at that point before it does the work.

Otherwise, if it does the work which the School District claims should not be done outside the scope of the contract clause, it is essentially seeking to ask a jury to engage in a legislative act of

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appropriating money. Or it could hold the School District hostage, so to speak, by doing the work always contending that something is beyond the scope of the work, as any contractor who might have a dispute or would be inclined to have a dispute would so do, which would take away from the School District its essential authority of being the authorizer of work and would undermine completely its duty to be the fiscal controller.

Now, that's old ground. Left to try are the School District's counterclaims for liquidated damages. Whether the liquidated damage clause is enforceable is a matter for a Court, not a jury. As to whether or not, assuming the liquidated damage clause is enforceable, there should be credit given to Acmat for delays caused by the School District. That may be an issue for a jury.

So let's discuss these two issues. Does anyone take issue with my observation that the Court, not a jury, is the determiner of the enforceability of the liquidated damages clause?

MR. DINEEN: Your Honor, if I may, the plaintiff does not take issue with the Court in the first instance, determining whether in fact the liquidated damage provision on its face is an enforceable provision. Whether it is allowed to be applied in any given situation is really a factual question which must go to a jury, but in the first instance whether the contract provision permitting liquidated damages is enforceable in light of what the law requires for liquidating liquidated damage provisions to be enforceable, that is really a question for the Court.

And in the briefs cited — in the briefs filed by Acmat, a number of considerations were presented to the Court upon which it should determine whether in fact these provisions in the Acmat contracts are indeed enforceable or not as a matter of law.

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THE COURT: Did you cite *Laughlin v. Baltedene* (ph.)?

MR. DINEEN: I don't recall, your Honor, quite frankly.

THE COURT: 191 PA Superior 611.

That case stands for the proposition that the enforceability of the clause is a question for the Court. Enforceability should be determined by comparing actual damages with liquidated damages and ensuring that the two measures are reasonably commensurate.

MR. DINEEN: Your Honor, the —

THE COURT: Did you cite that case?

MR. DINEEN: I can't find it in the original papers, your Honor.

THE COURT: Have you read it?

MR. DINEEN: I don't recall reading that, your Honor.

THE COURT: It looks good to me, as stating the law of Pennsylvania.

MR. DINEEN: Well, your Honor, Acmat is not contesting that that is in fact the law.

THE COURT: Okay. So I have to look at, on this case, the actual damages and compare them with the stated liquidated damages to see if they are reasonably commensurate.

MR. DENNIS: If I may, your Honor, my only reservation at this point is as to whether Acmat actually raised in its answer to our counterclaim the question of the enforceability of the liquidated damages provision; I don't believe it did. In the motion that was filed with your Honor, Acmat's position was that the School District

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could not recover actual damages — rather actual delay damages and liquidated damages, and I'm now going back to previous counsel.

THE COURT: Well, have you dropped the actual damages?

MR. DENNIS: We've dropped the actual delay damages, yes.

MR. DINEEN: Your Honor, if I may, there was one item remaining — well, there are actually several items remaining in the counterclaim which are actual delay damages and one of them is an \$87,000 counterclaim for the additional cost of air monitoring during the delay period, and that is a claim that is still in the case as far as I understand from Mr. Dennis, and that is a clear overlap of the liquidated damage claims.

In addition, there are claims for custodial overtime wages which take place during the delay periods which overlap again with the liquidated damage periods being asserted by the School District.

MR. DENNIS: If I may, your Honor, the custodial overtime wages are being asserted pursuant to an express contractual provision that obliges the contractor to pay for those overtime wages. They are not a part of delay damages from our perspective, as well as the air monitors cost, those costs were incurred in order for the work to be completed, not as a consequence of the delay.

MR. DINEEN: Your Honor, if I may, the reason that the air monitors are on the job in January through June of 1985 at the Rush School is because there is a delay to the project. At that point the School District has an option. It either seeks the cost of the air monitors and drops the liquidated damage claim, or it opts for the liquidated damages which it has done in this case.

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THE COURT: Were the air monitors there because of delay in the completion of the contract?

MR. DENNIS: I have to concede, your Honor, if the work had been done earlier, the air monitors would not have been there and therefore that amount would not have been incurred. However, the amount was incurred because the prosecution of the work to complete the job was necessary. In other words, in order to complete the job and do that work which was necessary, the air monitors had to be there.

MR. DINEEN: Your Honor, Mr. Dennis has just conceded that but for the delay there would have been no additional air monitoring cost. So clearly the direct cause of the additional air monitoring cost is the delay. And in the contracts they have an option. They can take actual delay damages or liquidated damages, but certainly not both.

THE COURT: The cost of completion is what Mr. Dennis is talking about. He's saying that that was a cost that should have been borne by Acmat in the prosecution of its work that the School District had to pick up. And that's what the School District is claiming.

MR. DINEEN: But, your Honor, that is no different from the other actual delay damage claims which have been asserted earlier by the School District and which have subsequently been dropped. For instance, the cost of —

THE COURT: As I recall, there was a specific understanding as to this matter between Mr. Dennis and Mr. Korn, cleaning up the apparent confusion between liquidated and actual delay claims.

MR. DINEEN: Your Honor, the question is —

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THE COURT: And what stayed in represents the meeting of their minds and the parties' minds with respect to what was actual delay claims. And the actual delay claims were taken out as they were understood by the parties.

MR. DENNIS: Well, your Honor, you've put me in an impossible position because I can't speak for Mr. Korn as to what —

THE COURT: I —

MR. DENNIS: — he may have agreed to with Mr. Dennis.

THE COURT: Everything was on the record. Whatever was done, it was on the record, so you're not at a great disadvantage. You can read the record as well as I could.

MR. DENNIS: Your Honor, in all candor, I don't recall — I must say I don't recall a specific agreement with Mr. Korn. I want to be honest with the Court and opposing counsel on this issue. I do recall Mr. Korn filed a motion and that motion was denied by the Court. That motion was calculated to make the School District elect and in response to that motion we withdrew certain damages from the case. That was in our response, the Court ruled and denied Mr. Korn's motion and nothing more was done by Mr. Korn about that after the Court's ruling.

THE COURT: I understand. I am not saying that there is some binding agreement enforceable by the Court on this. I am saying only that I have not had to, at this point, make a decision as to these — whether these two particular claims are actual delay damage claims or not. But up to this point there appeared to be, once Mr. Dennis made an action to delete actual delay damage claims, an understanding that what remained were not actual delay damage claims. If I have to make a decision, I'll make a decision.

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MR. DINEEN: Your Honor, am I to understand —

THE COURT: I mean, but if it appears to me that this was, that this air monitoring was a cost that was already paid for in the contract price that the School District had to incur additionally, that is not a delay claim.

MR. DINEEN: Your Honor —

THE COURT: That's not a delay claim, that's just a reimbursement of the contract price.

MR. DINEEN: Your Honor has to look at the cause of the cost. For instance, Mr. Frank Richmond who is the School Inspector at the Rush School while Acmat was performing its work was paid some additional moneys to monitor what was happening on that job. Now, there was no claim being made for the additional money that had to be paid to Mr. Richmond for performing his duties attendant to the Acmat work.

THE COURT: Well, you didn't have to pay Mr. Richmond, did you? Acmat didn't.

MR. DINEEN: Well, Acmat didn't have to pay the air monitor either. This was a consultant retained by the School District to monitor what was happening on the various school projects. As Mr. Dennis conceded, he would not have been paid any additional moneys if the work had been completed on time.

THE COURT: All right, is that what you're saying?

That's not what I've heard you say, but if that is the case then that would be an actual delay cost.

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MR. DENNIS: Your Honor, what I'm saying is that the air monitoring costs were a cost of completion. We had to have the air monitors there to complete the work. Now, if the work had been completed on time, we would not have incurred that expense, but it is a cost of completion. We couldn't complete the work without having air monitors. I don't know whether this is a —

THE COURT: But it seems to me that that's actual delay damage, and that may justify liquidated damages.

MR. DENNIS: But, your Honor, except unlike the cost of bus, the bus to bus students, I mean this was a cost incurred directly in connection with the work. The work could not proceed unless we had the air monitors there, so I believe it is a construction, a completion damage. Now, I understand counsel's argument, but that's what we contend.

MR. DINEEN: Your Honor, if I may, in presumably one of the considerations behind the liquidated damage provision and your determination whether it's enforceable or not in the first instance is a question as to whether in fact the School District would incur any additional cost by virtue of delay and if such cost would be incurred, what types of costs would be incurred? And certainly the School District had to understand in preparing these liquidated damage provisions that cost of air monitors on an asbestos removal project would be an additional cost that would be incurred in the event of a delay. And they —

THE COURT: It sounds to me, sirs and madam, that this air monitoring is in the category of actual delay damage. That's not a cost that would have been incurred. It's over and above the cost that would have been incurred had the contractor been on time. What are the actual delay damages, which would include this amount?

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MR. DENNIS: With the Court's indulgence for a few moments.

THE COURT: I have to compare the liquidated damages, the total liquidated damages versus the actual damages.

MR. DINEEN: In that regard, your Honor, while the School District has asserted initially in the case certain actual delay damages which it did incur, there was no indication as to what moneys were saved by the School District in not having the school open at that time, and that certainly has to play a major factor in determining whether the liquidated damage provision is enforceable in the first instance, and that may be information that you do not have before you now.

THE COURT: I don't know if that's something I have to take into consideration. There are some actual damages which were withdrawn, so I have to consider all of those as well as the costs of monitoring and even the custodial costs.

MR. DINEEN: If your Honor is going to rule that the custodial costs are delay costs, then yes, they should be included.

THE COURT: Well, I may not have to do that. The contract may entitle them to that separate recovery, even though these were delay costs.

MR. DINEEN: Well, if they are delay costs, they certainly fall under the number of the liquidated damage provision.

THE COURT: Do you want to take some time to figure those out?

MR. DENNIS: Your Honor, we don't have our statement of claim which has all of the items enumerated.

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(Pause.)

MR. DENNIS: Your Honor, as I was saying a minute ago, unfortunately we don't have all of our pretrial with us which includes that amount or the other document which does, but I do have a part of that document with respect to the Rush School and the general items apply with respect to other schools.

There's security necessary to keep the persons out of contaminated areas. And the amount in Rush for that particular item is \$31,554. There is inspector's wages — and this is all, by the way, from January 1, 1985, to June 28, 1985 — \$30,000.

Contract costs for air monitors during the same period, \$87,000, and the costs of busing Rush students to other schools, \$446,716.

THE COURT: What's the amount of liquidated damages you seek relative to Rush?

MR. DENNIS: I'm sorry, your Honor?

THE COURT: What's the amount of liquidated damages you seek as to the Rush School?

MR. DENNIS: \$128,500.

MR. DINEEN: I would just note, your Honor, these are amounts being claimed by the School District. These amounts necessarily actual expenditures as a result of any delays to the Rush School, but right now these are claimed amounts.

MR. DENNIS: I don't quite know what —

THE COURT: These are amounts that they are prepared to prove they have.

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MR. DINEEN: Correct.

MR. DENNIS: We paid \$87,000 for air monitors.

MR. DINEEN: I understand that's what you're claiming.

MR. DENNIS: Well, that's what the Court asked for, our claim.

THE COURT: Well, any argument that the actual damages, delay damages, are commensurate with the liquidated damage costs?

MR. DINEEN: I have no reason —

THE COURT: Certainly if you factor in \$87,000 for air monitoring.

MR. DINEEN: I have no reason one way or the other to doubt the accuracy of the costs. I think there are other considerations here, other than just the purported actual costs which were expensed in connection with the delay at the Rush School. You have to also look at what savings there were by virtue of not having the Rush School opened.

THE COURT: What savings could there be?

MR. DINEEN: Well, for instance, a large saving had to be not having to heat the building for one year. That had to be a substantial amount of money that the School District saved in not having to heat the building.

THE COURT: So they had to heat the building for additional students someplace else.

MR. DINEEN: Well, presumably they were in a building that's already being heated.

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THE COURT: How many students had to be moved?

MR. DENNIS: Your Honor, we don't have that information at this time.

THE COURT: Have you developed that information? It seems to me that the burden is on the School District to show the reasonableness of its actual delay costs and on Acmat to show the unreasonableness of it.

MR. DINEEN: Your Honor, we don't have any specific information one way or the other on what the savings were.

THE COURT: Okay, well, I'll make my judgment based upon the information I have. Discovery is closed.

MR. DINEEN: Well, discovery was closed before we came into the case, unfortunately.

THE COURT: All right. Well, make such a list for each of the schools.

MR. DENNIS: Yes, sir.

THE COURT: And bring it Wednesday.

All right. So you should offer to me evidence of actual expenditures for each of these schools. My understanding of the law is that where the contract is silent as to the means for extension of the contract, that the contractor will be allowed to show that the amount of liquidated damages should be reduced by the School District's delay.

So what does Acmat intend to present, for example, as to the Rush School?

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MR. DINEEN: Your Honor, Acmat is going to testify as to the difficulties encountered in attempting to complete the Rush School, the overinspection, the amount of additional work which was required to be performed by reason of different site conditions, by reason of directives from the School District to perform additional work.

THE COURT: Now, be careful. I will rule, as a matter of law as I already have, that certain work that was undertaken by Acmat without School Board approval was done at its own peril and therefore is not chargeable as delay to the School District.

Similarly, with respect to what Acmat contends to be differing site work, that that, too, without School Board approval, was work done within the scope of the agreement and therefore is not chargeable to School Board delay.

So what do you have chargeable to the School District that is beyond the scope of my ruling?

MR. DINEEN: Well, your Honor certainly granted to Acmat certain claims in certain amounts which did, in your view, represent additional work that was performed, and those items certainly will be testified to.

There are certain other items which occurred on the various jobs, Rush included, that being overinspection by the consultants for the School District, and this was a recurring problem through all the jobs; that will be testified to and that held up the work considerably.

In addition, you Honor, the fact that many of the claims were dismissed by your Honor on the basis that there was not School Board approval does not negate the fact that in fact they were extra

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work. And certainly if it's extra work, it entitles the contractor to an extension of time.

The fact may be that he can't get paid for the work, but it certainly extends the schedule. And certainly in defense of a liquidated damage claim, the contractor ought to be able to prove that there was additional work performed — whether or not he has been paid for it or not is irrelevant — that did extend the schedule.

THE COURT: Well, I agree with you that if there was work that was compensable, that is that it had School Board approval or as I have construed School Board approval, School District written approval, you'd be able to argue that a reasonable period of time extension to do that should be allowed. What's reasonable?

MR. DINEEN: Your Honor, in connection with the time extension provisions of the contract, they talk about unforeseen conditions or items that occurred that are not the fault of the contractor. And if the contractor performs extra work, whether or not he's entitled to be compensated for it by reason of School Board approval or lack thereof, the fact is that this is work which was not part of the original scope of the job. It was something that was unforeseen and it did extent the schedule. And even under the agreement itself, the contractor would be entitled to an extension of time.

THE COURT: No, no. Because a contractor may have failed to size a job up right does not mean that the contract completion date has to be extended because of the contractor's oversight or undersight; that doesn't make sense.

MR. DINEEN: Well, your Honor, in the first instance, I think that would be a question to be presented to a jury.

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THE COURT: It's a matter of law, it's a matter of logic. Unreasonableness, and the jury will not be required to do that which is silly, and you've just made a silly argument.

MR. DINEEN: Your Honor, we would never intend to present anything to the jury that's silly.

THE COURT: I know, but sometimes you say things that you don't even contend, and what you've just said is silly. That is, that a contractor should be excused at the completion end for a mistake it made at the beginning.

MR. DINEEN: Your Honor, I never said that. I said a contractor is entitled to an extension of time where he performs additional work. Obviously Acmat would have to establish that the work it performed was additional, not that it missed it or that it made a mistake in its bid, but that the work it performed was not contemplated. And that is what I said.

THE COURT: By whom?

MR. DINEEN: By Acmat or by any reasonable, prudent contractor doing the work.

THE COURT: I disagree with that. I mean, you're making the same argument you said you weren't making, and that is that the contractor should be relieved of the mistake that it may have made at the beginning. You have a difference of — you claim that the overspraying was something unanticipated and dealing with that took them a lot of time you hadn't anticipated.

The School District says that overspraying was within the scope of the work, for example, and it told you that. I have made a ruling that is was noncompensable, for example. That means, my ruling

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means that you can't contend you should be given an extension of the contract because you did that which was required to be done under the contract.

MR. DINEEN: Is your Honor saying that if overspraying is encountered which is, in fact, beyond the scope of the contract, that that particular problem cannot be presented to a jury in justification of a time extension?

THE COURT: Yes, where it was within the scope of the work.

MR. DINEEN: So Acmat is then free to testify that there was overspray at the Rush School or at the other schools which was, in fact, beyond the scope of the contract?

THE COURT: Only to the extent that I've ruled that it was beyond the scope of the contract and therefore was compensable.

MR. DINEEN: Well, your Honor has already ruled that it was not compensable because there was no School Board approval.

THE COURT: Yes, my ruling is saying it's not compensable. If it's not compensable, there is no entitlement to consideration of extension of the completion date. That would alter the contract.

MR. DINEEN: But your Honor is saying that because there wasn't a technicality followed in getting School Board approval, that means that whatever work was done by definition then is not extra work, and that's simply not the case.

THE COURT: That's the contract.

MR. DINEEN: That only — the lack of School Board approval relates only to whether Acmat's entitled to be compensated for the

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work or not. It has nothing to do with whether there is an extension of the schedule by virtue of having to do that work.

THE COURT: But you contracted to do the work, all the work that was within the scope of the agreement, by a certain completion date, that this agreement was, whether it was within the scope of the agreement, this, quote, "additional work." If it was not additional work, then you had already agreed to do that work before the end of the contract period.

MR. DINEEN: Your Honor, there are several bases which Acmat will seek an extension of time for. One is, for instance, the overinspection, a misapplication, a lawful implementation of the specification requiring that areas be cleaned and cleaned and cleaned over and over again which was not necessary. That held up the work.

THE COURT: All right.

MR. DINEEN: That was it.

THE COURT: But now you're talking about School Board delay.

MR. DINEEN: That's correct, that's a breach by the School District and in fact the contract talks about breaches by the School District being a basis for a time extension. Then there are the items of additional work. Now, your Honor has ruled as to the issue of compensation on those items, but using a *Neeva* (ph.) case, if that is going to be the standard upon which an item is determined to be extra or not, that is not what *Neeva* stood for. *Neeva* said basically that without School Board approval, you can't get paid for extra work, and that is basically the position that has been proffered by the School District and your Honor has, in essence, followed that.

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However, that doesn't change the nature of the work. It still can be extra work for purposes of getting a time extension, but under your Honor's ruling, you can't get additional compensation for it.

MR. DENNIS: Your Honor, I believe that the Court's ruling should govern this situation. Now, if the Court ruled that it wasn't authorized extra work, then the work was unauthorized and there should be no basis for an extension of time. The contract speaks in terms of the School District may grant an extension under certain circumstances; it's not obligatory.

Furthermore, I would submit that the overinspection item which has been repeated often by counsel falls within this category. That was ruled on by the Court under the Rush School as being an item not subject to compensation, unauthorized and therefore should not be the basis of any extension of time.

THE COURT: Well, cannot this for inspections that had to be paid for by Acmat?

MR. DENNIS: No, no, these were inspections by the air monitors to determine whether the asbestos was in fact removed to the levels that were dictated in the specification. And Acmat's position is that is was overinspection, a too rigid application of those specifications which caused it to incur delays for which it sought extra compensation.

THE COURT: Well, I don't see any reason why Acmat can't present evidence that it was unable to get to do its contract work because the School District required it to slow down, basically. I mean, that's what this proceeding would be. Acmat would have to show that it was going along at a certain pace and the School District required it to do things that weren't reasonable and therefore,

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necessarily, extended the time that would have taken a reasonably prudent contractor to do the work.

That's a different argument than one where Acmat basically is saying it should be excused for making a mistake as to what was contemplated by the scope of the agreement.

Are there any categories of claim where the School District — the School District, not the School Board — the School District acknowledged that certain work was beyond the scope of the agreement, but there was no writing by the School District directing the work for which Acmat seeks payment but the School District has said that payment is not required because there was no School Board approval?

As to any such category as that, testimony would be permitted as to time extension —

MR. DENNIS: Your Honor, may I —

THE COURT: — because that is an instance where there has been verbal direction by the School District representative to do something, Acmat has undertaken to do it and the issue of nonpayment does not translate into misinterpretation of the contract by Acmat or mistake by Acmat.

MR. DENNIS: Well, accepting that approach, your Honor, it seems to me that one has to focus on the level where any such instruction emanated. For example, inspector only had certain responsibility.

THE COURT: I agree. It would have to be from someone who was in a position to give such direction.

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MR. DENNIS: If I could, your Honor, may I just go back for a second to overinspection? I just have one other item I would like to call to the Court's attention.

THE COURT: Yes.

MR. DENNIS: In the specifications it provided that certain standards had to be met with respect to the removal of asbestos, that is, certain fibers per cc. And it seems to me that if Acmat's position is the overinspections were to get it to go below what was called for in the specifications, I can see the approach of Acmat's offering that it should be able to come in and show those overinspections.

If the inspections were to get Acmat down to the level described in the specifications, then I would submit to the Court that that is not the type of, quote, unquote, "overinspection" which Acmat should be allowed to come in and present evidence on with respect to delay damages.

THE COURT: I don't know what evidence can it be. If it's not worthy to go to the jury, it won't go to the jury.

MR. DENNIS: Well, perhaps your Honor would entertain an offer or require an offer of proof at some point because it seems to me to go through that testimony which doesn't address the issue I'm suggesting is going to be quite a bit of — could be quite a bit of time.

THE COURT: I don't know what overinspection means.

MR. DINEEN: If I may, your Honor, it's a term that's been used somewhat loosely. The nature of the Complaint essentially is that the inspectors on various jobs were requiring Acmat to get an environment which, one, was impossible to achieve and, two, which

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was not required by the specifications, and there will be substantial testimony on that.

Two, there were delays in getting inspections done which caused contamination of areas which would not have been contaminated had there been timely inspection as required by the contract.

Three, there were errors in the actual air sampling tests that were conducted; areas were wrongfully rejected and then several days later, new tests would be done and the areas were accepted, and this was a problem that happened repeatedly throughout the Rush School. And these were instances where Acmat's work was obviously held up by virtue of that.

MR. DENNIS: With respect to Mr. Dineen's first point, your Honor, my understanding was that Acmat had contended that the work practices supplement in the specifications were impossible to meet. And, quite frankly, this is the first time that I've heard that Acmat's contending the position that Mr. Dineen just stated.

THE COURT: Well, they won't be able to say they were impossible to meet because that was the contractual undertaking.

MR. DENNIS: But that's what they have said, your Honor.

THE COURT: I heard what was said. But again, logic has not been ruled out of the law. Any other areas of claim of School Board delay?

MR. DINEEN: If we're only talking about Rush right now, we're talking primarily about the overinspection problem as I have defined that loosely, the additional work that had to be performed, delays in getting approvals of areas to be cleaned, interference by School District employees walking through areas which had been

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cleaned and then thereafter had been contaminated and had to be reclaimed. That is basically the sum and substance of the items that will be presented in support of time extensions to negate the liquidated damage claims.

THE COURT: And you have quantification of all of these claims?

MR. DINEEN: In terms of time?

THE COURT: Yes.

MR. DINEEN: Yes, your Honor, through the testimony that will be done.

THE COURT: How long will it take you to present your testimony, let's say, at the Rush School?

MR. DINEEN: There will be three different witnesses testifying to these conditions and it will take several days; perhaps two days.

THE COURT: And how long would the School Board anticipate rebuttal testimony taking?

MR. DENNIS: About two days, your Honor.

THE COURT: All right, well, we'll do the best we can. Have all of your witnesses here, and prepare to put on full days of testimony. It may be that things over which you have no control and in some respects over which I have no control might shorten some of the trial days, but you'll get everything in that you're entitled to get in in your case and considered by a jury.

MR. DINEEN: Your Honor, may I pose a question to the Court?

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THE COURT: Yes.

MR. DINEEN: One, in terms of how we are going to proceed, is the plaintiff going to be required to go first and present a case or is the School District essentially going to be deemed the plaintiff on a counterclaim and go forward on its claim first? Just in terms of how the scheduling of the trial is to proceed because I think in terms —

THE COURT: I will make — pardon?

MR. DINEEN: I think in terms of what the outstanding contract balances are at this point and in terms of what the Court has already ruled to be the additional compensation due Acmat, I don't think there is any dispute in the case as to what those numbers are.

THE COURT: All right. Those matters have already been — that which have been, those things which have been determined have been determined. What is left are liquidated damage claims on the School District's counterclaim where it is the plaintiff.

MR. DENNIS: Your Honor, of course the Court's order of December 22nd made no reference to any contract balances. There has been no determination with respect to the contract balances and, indeed, it is our position that Acmat has not made a claim for contract balances in its amended Complaint.

THE COURT: Well, beyond that, I mean that's something that is calculable. That is, I'm not sure that issue is before me. I don't think that issue is before me.

One of the reasons I don't think it's before me is that the School District has informed me on the record that it continues to claim there has not been contract completion in that certain certificates

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have not been forwarded certifying the whereabouts of certain asbestos which was removed.

Am I correct in my recollection?

MR. DINEEN: You're correct in that. Your Honor, as far as I know, all the so-called dump slips or dump tickets which were prepared in connection with the actual disposal of the asbestos material have been furnished to the School District. If there is something that they feel they haven't received, I think it's incumbent upon them to come forward and say what they haven't received.

THE COURT: I'm just telling you I don't think this issue is before me. If it is before me, I'll be willing to try it. I mean, if that's the only issue standing, maybe not today but at some point...

MR. DINEEN: Your Honor, I point out also for the record that Paragraph 13 of Acmat's amended Complaint alleges that the School District has not paid Acmat in accordance with the terms of the contracts and modifications and that is a clear reference there to the contract balances remaining on the various school projects.

THE COURT: I don't think there's a clear reference.

MR. DINEEN: Well, whatever moneys are due on the three schools are encompassed by Paragraph 13 of the amended Complaint. If there is an agreed contract price for the work and that price has not been paid yet, then I think we can certainly stipulate that there is a certain amount of money which remains due under that contract.

MR. DENNIS: Nowhere in the amended Complaint does Acmat claim contract balances. Nowhere on the record up to this point, except as it came up on the course of discussion in chambers

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at the pretrial, has there been a claim for contract balances, and our position is that claim was not made in this case; it is not a part of this case.

THE COURT: Well, I'm not going to try it in this case.

MR. DINEEN: Well, your Honor, frankly there is nothing to try; the number is already known. For instance —

THE COURT: I agree, it would be known, that is, what the contract price was and what you'd been paid. The difference is the contract balance and whether that balance is zero or a plus depends upon how the allowances work out.

MR. DINEEN: All right, but I wanted that understood.

THE COURT: And as to whether or not you should receive any plus contract balance is something that is not before me, though, at this point.

I mean, assuming that you're entitled — I mean, after things work out you'd be entitled to a dollar theoretically, I don't think I have the power to order the School District to pay that dollar.

MR. DINEEN: Your Honor, if at the end of the trial if a jury determines that the School District is entitled to no credits by virtue of having to do any completion work of Acmat's contracts, are you saying that you don't have the authority to direct the School District to pay Acmat the contract balances?

THE COURT: Yes. My understanding is — and I'll repeat myself — that the School District contends that it never got all of the dump slips. That's been a serious contention made known to Acmat throughout this matter. And your statement is the first time I've even heard from an attorney for Acmat that it contends that all

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of the dump slips have been provided. There were statements before, I'll check on it, but never any such statement as you have now made that all the dump slips have in fact been provided. That is a serious matter, in my opinion, one in which I would think you would not want presented to the same jury that is going to hear these other claims.

MR. DINEEN: Your Honor, I have no problem with the jury hearing about dump slips. The fact is, and the witnesses will testify that all the asbestos material was disposed of properly. And the dump slips I have seen covering letters enclosing copies of the dump slips to the School District and I didn't realize that it was still an issue in the case, quite frankly.

MR. DENNIS: Your Honor, we have asked for the dump slips, we have not received them. They were a condition of final payment that has not been complied with and the plain fact of the matter is, it's not before the Court at this time, as your Honor has pointed out.

MR. DINEEN: Well, I'm not sure what's not before the Court.

THE COURT: Well, I'll tell you what you do: Wednesday morning you present copies of all of the dump slips.

MR. DINEEN: We will, your Honor.

THE COURT: And also evidence that they were given to the School District.

MR. DINEEN: We will.

THE COURT: It may not be before me, but there is no reason for this cat and mouse game — excuse my phraseology — to continue longer than it has to be. You have heard the School District say they haven't gotten the dump slips. You said they exist, you say

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the School District has gotten copies. You both can't be right. Maybe you're both wrong. But to the extent that there is a chance that you could have a meeting of the minds as to who is right and who is wrong, wholly or in part, clear it up on Wednesday.

MR. DENNIS: If I may, your Honor, the only dump slips that were provided were in connection with the Rush School and there was no indication that that was all of the dump slips. They were sent to us by Mr. Korn along with a letter which we will make available stating that basically this is all we could find. And that's all we know about the dumps slips as of — or the dump tickets as of this point.

MR. DINEEN: Your Honor, the issue of dump slips on the other schools is an interesting one. On one of the punchlists at the Fairhill School it showed up as an item on the punchlist. There is a letter to the School District enclosing the dump slips together with a maintenance bond and a few other things which are needed to get final payment and dump slips is crossed off the punchlist. So obviously the School District received dump slips at the Fairhill School and I believe the same is true for Lincoln School. There was a letter enclosing the dump tickets together with a maintenance bond and whatever else was required for final payment at Lincoln.

THE COURT: Well, it seems to me that you could do it on Wednesday morning or some other time that is your own time to resolve that issue, but that is not before me. I have always understood that to be a problem that was not raised in these claims and counterclaims. There was a matter for administrative determination as to what satisfied the contract as to asbestos dumping.

MR. DENNIS: Your Honor, one other item. With respect to the School District's counterclaim, I just wanted to mention again that we also have completion damages. We got into that a bit when we

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were talking about the air monitoring costs, but that certainly is an important part of our counterclaim.

THE COURT: How much is that?

MR. DENNIS: Pardon?

THE COURT: How much is your counterclaim for that?

MR. DENNIS: With the Court's indulgence.

(Pause.)

MS. SHAFFNER: Your Honor, we have, for example, the cost of flooring work which was performed at the Rush School in the amount of \$57,000. We have other completion costs incurred by School District maintenance personnel in an amount close to \$50,000 and, again, custodial overtime wages which were required to be paid by the contractor under the contract.

MR. DENNIS: I can be more precise, your Honor. I have the document in front of me now, if I may. With respect to the Rush School there is a claim for 24,000 — approximately \$24,000 custodial overtime which I previously mentioned was a contractual claim, a lot of which related to overtime during the course Acmat was on the job itself. Your Honor has ruled on the air monitors claim and completion costs by School District maintenance personnel were approximately \$57,000, the cost of repairing the damage to flooring because of the method of Acmat's removal process as well as some frozen water pipes caused by Acmat's failure to protect the building, \$57,000.

With respect to the Lincoln School there is a custodial overtime claim of approximately \$3,000. With respect to Fairhill there is a

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claim for unauthorized phone use, which is very minor, \$740 and a custodial overtime claim of approximately \$8,000.

And cost of cleaning the building which was a part of Acmat's contract in the amount of approximately \$19,000.

THE COURT: Is there anything else?

MR. DINEEN: Well, your Honor, on Wednesday just my final question would be who goes first.

THE COURT: The School District.

MR. LEVIN: Your Honor, I have one matter which relates personally to me and I have spoken to all counsel about it. I have entered my appearance and I am basically acting as local counsel. Mr. Dineen and Mr. Stein who you've admitted pro hac vice will actually be conducting the trial and I was going to ask — I am asking leave not to attend trial.

THE COURT: Granted.

MR. LEVIN: Thank you very much, you Honor.

THE COURT: But you should keep abreast through them of what is going on so that if something comes up with this which is within your concern as local counsel, you should be in a position to respond to it without expecting the Court to call you up and say come down here.

MR. LEVIN: Yes, your Honor. I will check in from time to time during every trial day, your Honor.

THE COURT: But you don't have to sit here —

MR. LEVIN: Thank you very much.

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THE COURT: Anything else?

MR. DENNIS: No, sir.

MR. DINEEN: No, sir.

THE COURT: Thank you. Good day.

(Proceedings concluded at 12:30 p.m.)

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

7/5/89

Date

signature

Geraldine C. Laws

Laws Transcription Service

signature

Grace Williams

**APPENDIX E—EXCERPTS FROM RUSH SCHOOL
CONTRACT**

SPEC. B-216 of 1983/84

ASBESTOS REMOVAL

BENJ. RUSH SCHOOL

THE SCHOOL DISTRICT OF PHILADELPHIA

BOARD OF EDUCATION

THIS AGREEMENT made the 11TH day of JUNE one thousand nine hundred EIGHTY-FOUR (1984) between the SCHOOL DISTRICT OF PHILADELPHIA, hereinafter called the SCHOOL DISTRICT, and ACMAT CORPORATION, hereinafter called the Contractor.

WITNESSETH:

The Contractor hereby agrees to furnish and deliver all of the material and to do and perform all of the work required in accordance with the general conditions, special conditions, and specifications attached, which said contract documents are hereby made a part of this agreement as fully to all intents and purposes as though herein set out at length, and in accordance with the drawings, plans and supplemental bulletins, if any, supplementing the specifications.

The Contractor agrees that all of the material used in the said work shall be the best of its several kinds and qualities, and that all of the said material and work shall be subject to the inspection and approval of the Board of Education of said School District, and if any of the said material or work, or both, shall be rejected as defective or not in accordance with the specifications, then the said material shall be replaced with other material and the said work shall be done anew immediately to the satisfaction and approval of the said Board of Education at the cost and expense of the said Contractor. All material furnished shall be new.

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The Contractor agrees that the work shall be completed IN ITS ENTIRETY PRIOR TO AUGUST 31, 1984, and if the said work AS SPECIFIED IN ARTICLE SC-01A, OF THE SPECIAL CONDITIONS. is not completed within the time specified, it is agreed that the sum of FOUR HUNDRED AND 00/100 (\$400.00) Dollars per day shall be paid to the SCHOOL DISTRICT by the Contractor, or at the option of the SCHOOL DISTRICT shall be deducted from the amount due the Contractor, for every day the said work shall remain uncompleted or unfinished after the said date, not as a penalty but as ascertained and liquidated damages, which sum so deducted shall remain the property of the SCHOOL DISTRICT. (It is further agreed that shall the Contractor, in the opinion of The Board of Education be prosecuting the said work with an insufficient stock of material or insufficient number of skilled workmen for the prompt completion thereof within the specified time, or be improperly performing the said work, or shall neglect or abandon it before its completion or unreasonably delay the same, so that the terms of the contract are being violated or executed in an unworkmanlike manner or in bad faith, or shall neglect or refuse to renew or again perform such work as may be rejected by The Board of Education or otherwise default in the performance of this contract, then and in any such case the SCHOOL DISTRICT may notify the said Contractor in writing of such neglect or default; if such notification be without effect for 48 hours after the delivery thereof, then and in that case the SCHOOL DISTRICT may notify the Contractor to discontinue all work under this contract and the SCHOOL DISTRICT shall thereupon have full authority and power immediately to do any or all of the following: to let a new contract or contracts for the completion of said work to such person or persons as it may select and for such price or prices as to it may seem proper, to purchase such material, tools and machinery, and to

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employ such workmen as in its opinion shall be required for the proper completion of the said work at the cost and expense of the Contractor, or the said SCHOOL DISTRICT may hold said Contractor liable for any and all damages suffered and in such event the performance bond and retained percentage or bond held in lieu thereof, and the material delivered and used in, on or about the said work shall then become the property of the SCHOOL DISTRICT for such use and/or application as it may deem proper.)

The Contractor agrees to properly enclose and protect the said work, and to be responsible for and pay all loss or damage to either person or property which might in any manner occur by reason of negligent prosecution of the said work during the progress of the same or as a result thereof, and in case of the happening of such loss or damage, in addition to any other remedy the SCHOOL DISTRICT might have, the amount thereof may be retained by the said SCHOOL DISTRICT out of any payments due or which might become due hereunder.

The Contractor agrees to be responsible for and pay for all loss or damage to property of the SCHOOL DISTRICT OF PHILADELPHIA which might in any manner occur by reason of the prosecution of the work during the progress of the same, and the Contractor further agrees to be responsible for and pay for all loss or damage to property of the SCHOOL DISTRICT OF PHILADELPHIA which might occur after completion of the work contemplated by this contract but resulting from the performance of the work by the Contractor.

The Contractor agrees not to assign or transfer this contract, nor to assign or transfer in whole or in part any rights or privileges that

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may accrue under the terms of this contract, nor to assign any money that may become due to the said Contractor hereunder.

It is further mutually agreed between the parties hereto, and it is hereby made part of this contract, that nothing contained herein or in the specifications hereto attached shall be taken or construed to preclude the SCHOOL DISTRICT from contesting the estimates or certificates of its officers or agents or any claim of the said Contractor under this contract, or under such estimates or certificates, but the SCHOOL DISTRICT shall be at full liberty to raise every legal defense as to the character, quality and quantity of the said material and work, and as to the time and manner in which the same must be furnished and done, notwithstanding the certificates or approval of any officer or agent of the SCHOOL DISTRICT.

It is mutually agreed that this contract is entered into under and subject to the provisions of the Public School Code of 1949 (Act of March 10, 1949, P.L. 30), its amendments and supplements, and the rules and regulations of The Board of Education.

The SCHOOL DISTRICT agrees to pay to the Contractor for the material to be furnished and work to be done under this contract the sum of FIVE HUNDRED NINETY FIVE THOUSAND AND 00/100 (\$595,000.00) Dollars.

The said Contractor does hereby certify acceptance of and compliance with all of the applicable provisions of the Workmen's Compensation Act, its amendments and supplements.

As used herein the singular shall include the plural; the masculine shall include the feminine and the neuter; "specifications" shall include but shall not be limited to drawings, plans and supplemental

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bulletins; "material" shall include but shall not be limited to supplies, articles, equipment and appliances; "work" shall include but shall not be limited to material, labor, supplies, articles, equipment, appliances and tools.

IN WITNESS WHEREOF each corporate contracting party has caused this contract to be signed by its proper officers and its corporate or common seal to be affixed, and such of the contracting parties as are not incorporated have individually signed and sealed this instrument, the day and year aforesaid.

THE SCHOOL DISTRICT OF
PHILADELPHIA,
PENNSYLVANIA

signature_____

President

6-11-84

signature_____

Assistant Secretary

If Contractor is an individual proprietorship or is a partnership,
sign here

(SEAL)

(Trade name of Firm)

(SEAL)

(Signature of Owner or Partner)

If Contractor is a corporation, sign here

ACMAT CORPORATION

Name of Corporation

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[Corporate Seal] signature
(Asst Secretary)

By

signature

(President or Vice-President)

Henry W. Nozko, Sr.

Executive Vice President

(stamp) PLAINTIFF'S EXHIBIT

**PROJECT SUPERVISION AND AIR MONITORING
CONTRACT**

5. AWARDS

- (a) Awards of contracts will be made to the lowest responsible bidder in each case. The responsibility of the bidder shall be determined solely by the Board. The Board reserves the right to reject all bids.
- (b) In case of receipt of equal bids, the Board will determine which bidder, in its judgment, is to receive the award of contract.

**6. CONTRACT EXECUTION AND PERFORMANCE AND
PAYMENT BONDS.**

- (a) The bidder agrees that if the contract is awarded to him, he will execute and return the contract documents within five working days of their receipt by him.
- (b) The bidder shall furnish a performance bond in an amount at least equal to 100% of the contract price as security for the faithful performance of this contract.

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- (c) The bidder shall also furnish a separate labor and materialmen's bond in an amount at least equal to 100% of the contract price as security for the payment of all persons performing labor and furnishing material in connection with this contract, whether or not they become part of the completed project.
- (d) On contracts of \$5,000.00 or less, no performance bond or labor and materialmen's bond is required, but the School District will require a signed agreement on contracts between \$2,000.00 and \$5,000.00.

7. CONDITIONS AFFECTING THE WORK

- (a) The Contractor shall be responsible for ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the School District. The School District assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the receipt and opening of bids other than by a bulletin or addendum that is duly issued.

8. ACCIDENT PREVENTION

- (a) The contractor shall take proper safety and health precautions to protect the work, the workers, the public and the property of others. He shall observe the provisions related thereto of applicable laws and building and construction codes and also of the Manual of Accident

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Prevention in Construction, published by the Associated General Contractors of America to the extent that such provisions are not in contravention of applicable law. The General Contractor shall, when existing circumstances so indicate, provide appropriate watchman service at night and over weekends and holidays.

- (d) If any work or material is not in accordance with the drawings and the work, such material or work shall be removed and replaced to the satisfaction of the School District together with any work disarranged by such alterations. All such work shall be done at the sole expense of the contractor, or if for any reason it may be expedient to the School District to accept such work, it may deduct from the amount of money to be paid to the contractor an amount equal to the difference in the value between said work and that which is specified or shown on the drawings.

12. TESTS

- (a) Tests of material, unless noted otherwise shall be paid for by the School District. The selection of bureaus, laboratories and/or agencies for the inspection and testing of supplies, material and equipment (not paid for by the School District) shall be subject to the approval of the School District. Satisfactory documentary evidence that the material has passed the required inspection and tests shall be furnished to the School District.

13. DRAWING AND SPECIFICATIONS

- (a) Anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned

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in the specifications shall be of like effect as if shown or mentioned in both. In case of differences between drawings and specifications, the specifications shall govern.

- (b) In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly reported to the School District, which shall make a determination.
- (c) All dimensions shown on the drawings and in the specifications and in modification thereto shall be verified by the contractor at the site before work is begun. On the drawings, figured dimensions shall be taken in preference to those scaled dimensions; details shown on large scale drawings shall be taken in preference to those shown on small scale drawings; and descriptive indications shall be taken in preference to the material code.

14. MODIFICATION OF CONTRACT DOCUMENTS

- (a) The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in contract price being subject to the approval of the Board.
- (b) The determination of the increase or decrease in compensation to be paid to the contractor for additions to or reductions in the work, respectively, shall be determined

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by application of unit prices when such are set forth in the Special Conditions of the contract, or, in those cases where unit prices are not applicable, by a lump sum mutually agreed upon by the Board and the contractor. If however, unit prices are not applicable and if the parties cannot agree upon a lump sum, then additional compensation to be paid the contractor shall be determined by the actual net cost in labor and materials, plus fifteen percent (15%) for profit and overhead. Reductions in the contract price in the form of credits shall be determined by the actual net cost in labor and materials if the aforementioned lump sum cannot be agreed upon. The fifteen percent (15%) for profit and overhead will be retained by the contractor. The School District will make the final determination as to net cost of labor and materials.

- (c) Should the contractor encounter subsurface and/or other conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the School District of such conditions, before they are disturbed. The School District will investigate the conditions and if it finds that they materially differ from those shown on the drawings or indicated in the specifications, it shall make such changes in the drawings and/or specifications as it may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes.
- (d) Verbal instruction given by any of the officers, agents, or employees of the Board which depart from the contract documents shall not be binding upon the Board.

*Appendix E***15. TIME OF COMPLETION**

- (a) All time limits are of the essence.
- (b) Contractors shall commence work under the contract within five calendar days of receipt from the School District of a notice to proceed and shall fully complete all work thereunder within the time specified in the special conditions.
- (c) If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts of neglect of the School District, act or neglect of any other contractor, fires, floods, epidemics, quarantine restrictions, strikes, or freight embargoes, the period herein-above specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall not be entitled to any damage or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.
- (d) No such extension of time shall be deemed a waiver by the School District of its right to terminate the contract for abandonment or delay by the contractor from full responsibility for performance of his obligations hereunder.
- (e) All material, equipment and appliances called for or reasonably to be inferred from these specifications as being required shall be furnished complete, in place and ready for use on the date fixed upon herein as the completion date, and in the event the specifications are not fulfilled upon the

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completion date, it is mutually agreed between the parties hereto that the following amounts shall be paid to the School District by the contractor or shall be deducted from the amount due the contractor, as liquidated damages, for every day the contract shall remain uncompleted after the said completion date. The said amount so deducted shall remain the property of the School District of Philadelphia.

Amount of Contract Damages	Liquidated per day
\$5,000 and less	20
Over \$5,000 and less than \$10,000	40
Over \$10,000 and less than \$15,000	60
Over \$15,000 and less than \$20,000	75
Over \$20,000 and less than \$50,000	100
Over \$50,000 and less than \$100,00	150
Over \$100,000 and less than \$300,000	250
Over \$300,000 and less than \$500,000	300
Over \$500,000 and less than \$1,000,000	400
Over \$1,000,000 and less than \$1,500,000	500
Over \$1,500,000 and less than \$2,000,000	600
Over \$2,000,000 and less than \$3,000,000	700
Over \$3,000,000 and less than \$5,000,000	800
\$5,000,000 and over	850

- (f) In lieu of liquidated damages set forth in part 17(e) herein above, the School District reserves the right to elect to hold

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this contractor responsible for actual damages incurred, both compensatory and consequential.

- (g) Contractor acknowledges and agrees that work under this contract must be completed during the calendar period specified and at no other time. Contractor must cease removal work and completely decontaminate building five (5) days prior to scheduled opening of school. In the event, removal work is not completed in time to allow decontamination prior to opening of school, contractor will be required to cease removal work, decontaminate the building in time for opening of school and complete the balance of removal work at a subsequent period when the school is not occupied at no additional cost to School District and subject to damages provision specified herein.

16. SAMPLES

- (a) Prime contractors shall submit to the School District samples in duplicate of all material to be incorporated in the work as set forth in the Special Conditions, Specifications, or as requested by the School District.
- (b) All material shall be subject to inspection and test as to their compliance with these specifications and no work shall be started until the material therefore has been accepted and approved by the School District.
- (c) All tests shall be paid for by the School District, except those for cement, reinforcing steel and structural steel and subsequent tests noted in sub-paragraph (h) which shall be at the expense of the contractor.

*Appendix E***SC-04 GENERAL**

These conditions, together with Articles #1 to #37 inclusive of the General Conditions and every part herein, are binding upon each contractor and subcontractor insofar as they can, or do, apply to him or his work, and he shall be responsible for neglect to read or to attend to any article or item contained herein.

SC-05 COOPERATION

If this contract is proceeding concurrently with others in the building, this contractor shall cooperate with the other contractors in expediting the work of all. He shall secure and anchor the work and avoid damage to the work of the other contractors and shall do everything necessary in order that the general public and the School District shall not suffer any injury to persons or property.

SC-06 BID WITHDRAWAL

Withdrawal of bids will be considered if the reason meets all of the requirements of Act 4 of 1974, as enacted by the General Assembly of the Commonwealth of Pennsylvania.

SC-07 EXAMINATION OF THE SITE

The contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully on all determinable, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same.

SC-08 MECHANICAL PRINTING ERRORS

Each contractor shall check the specifications for missing pages or pages partially blank due to mechanical printing errors. Any such

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specification will be replaced immediately upon presentation to the Board. In no case will allowances in contract bids be made for such omissions.

97a

**APPENDIX F—AMENDED FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
DATED OCTOBER 24, 1989**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
ACMAT CORPORATION**

v.

SCHOOL DISTRICT OF PHILADELPHIA

CIVIL ACTION

NO 85-7067

/stamp/

FILED

SEP 21 1989

By: MICHAEL E. KUNZ, Clerk

FILED OCT 24 1989

/stamp/

ENTERED: Oct 24 1989

CLERK OF COURT

EXHIBIT A

AMENDED FINAL JUDGMENT

AND NOW, this 24th day of October, 1989:

**WHEREAS, by order of this Court dated December 21, 1988,
and as modified by the Orders of June 29, 1989, and September 7,
1989, it was determined as a matter of law that on ACMAT's
Amended Complaint it was entitled to \$132,420.74 against the
School District; and**

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WHEREAS, by its answers to Special Interrogatories a jury has found (1) in favor of the School District and against ACMAT in the amount of \$23,480.92 on defendant's counterclaim for delay damages; (2) in favor of the School District and against ACMAT in the amount of \$16,975.42 on defendant's counterclaim for completion and other damages; and (3) in favor of the School District and against ACMAT on plaintiff's Amended Complaint for contract balances of \$150,909.14, which the School District has the contractual right to forfeit based upon the jury's determination of breach by ACMAT;

It is hereby ORDERED and DIRECTED that Final Judgment in this matter is AMENDED and JUDGMENT is entered in favor of ACMAT in the sum of \$91,964.40, with legal interest to run from this date of Final Judgment.

The award is calculated as follows:

\$132,420.74	(Court's Cost Award to ACMAT)
- 23,480.92	(Jury Award to School District for Completion and other Costs)
- 16,975.42	(Jury Award to School District for Delay Damages)
<hr/>	
\$91,964.40	

BY THE COURT:

signature
James T. Giles, J.

**APPENDIX G—TRANSCRIPT OF ARGUMENT BEFORE
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
ON SEPTEMBER 6, 1989**

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

ACMAT CORP.

vs.

SCHOOL DISTRICT OF PHILADELPHIA

CIVIL ACTION NO. 85-7067

Philadelphia, Pennsylvania

September 6, 1989

1:30 o'clock p.m.

JURY TRIAL

BEFORE THE HONORABLE JAMES T. GILES, J.

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

**JOSEPH DINEEN, ESQUIRE
EDWARD A. STEIN, ESQUIRE
Goddard & Blum
675 Third Avenue
New York, NY 10017**

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JAY M. LEVIN, ESQUIRE
Galfand Berger Lurie & March
1737 Chestnut Street - Suite 800
Philadelphia, PA 19103

For the Defendant:

ANDRE L. DENNIS, ESQUIRE
PAULA D. SHAFFNER, ESQUIRE
Stradley, Ronon, Stevens & Young
2600 One Commerce Square
Philadelphia, PA 19103

Audio Operator:

Andrew Schwab

Transcribed By:

Mary Morrow

Proceedings recorded by Electronic Sound Recording;
transcript produced by transcription service.

(The following occurred in open court at 1:30 p.m.)

THE COURT: All right. The matter of Acmat.

(Discussion off the record)

THE COURT: State your appearances for the record, please.

MR. DENNIS: Andre Dennis, counsel for the School District
of Philadelphia

MS. SHAFFNER: Paula Shaffner, also counsel for the School
District of Philadelphia.

MR. DINEEN: Joseph Dineen for Acmat Corporation.

MR. STEIN: Edward Stein for Acmat Corporation.

THE COURT: Thank you for being here. I have been moved
by Acmat to reconsider the judgment entered because of the lack of

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factual support that the award, particularly the first judgment order award, contained contractual 15 percent for overhead and profit for approved extra work pursuant to the contract between the School Board, the School District and Acmat.

MR. DINEEN: Your Honor, may I interject for a moment.

THE COURT: Yes, sir.

MR. DINEEN: Your Honor, Acmat had requested following the trial and subsequent thereto that 15 percent for overhead and profit be added to the amounts awarded by the Court back on December 21, 1988. The amounts that were rewarded by the Court are numbers that were given to the Court by the School District. They were net costs of labor and material and did not include 15 percent for overhead and profit and Acmat requested, consistent with that order, that the contractually mandated 15 percent be added to that number.

THE COURT: That's right.

MS. SHAFFNER: Your Honor, if I may respond just briefly to that. Some of the numbers which were used by your Honor in the December 21st order were numbers which were also provided by Acmat Corporation rather than numbers that were provided by the School District of Philadelphia.

So, I'm unclear as to whether Acmat is now saying that they are essentially moving for reconsideration when they ask for overhead and profit, but it would be our understanding that they would have to file a motion for reconsideration to have this Court award overhead and profit on any of the numbers including those numbers that were Acmat's submissions.

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THE COURT: Well, I'm going to reconsider the award. I'll take — is there a motion for reconsideration, Mr. Dineen?

MR. DINEEN: Your Honor, Acmat's motion is not technically for reconsideration. There was nothing — obviously we have objected and excepted to the entire award on the grounds that the numbers were not high enough, but the sole question before the Court, my understanding was for this hearing or this argument, was whether the 15 percent for overhead and profit was included in the numbers that were awarded by the Court.

THE COURT: So, I construe that as a motion for reconsideration of all the numbers. The accuracy of the numbers relied upon by the Court insofar as the 15 percent, and if Acmat's submission to the School District for its claim on some item included the 15 percent, the School District will have to show how that became a part of the number it suggested as the allowable figure for purposes of the submission that had been made.

Let's go back to item — we'll go through it item by item.

MS. SHAFFNER: Your Honor, if I can also interject. The School District has also asked by letter that the Judge reconsider the amounts which your Honor relied upon —

THE COURT: I'll go through each item. You can tell me the basis for your original submission, as well as the basis for any recalculation, and I'll make a determination item by item as to whether or not I will allow any lower figure than had previously been submitted to be used against Acmat.

I relied upon the accuracy of the figures submitted both by Acmat and the School District, but particular by the School District because it said that this is the amount that it would allow based upon its

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exercise of discretion. And that submission coming as it had after all the time that had elapsed and the completion of the contract or this removal of Acmat from the job site impressed me as numbers well researched. What I'm told now is the numbers weren't nearly as well researched as I thought they were.

MS. SHAFFNER: Actually, your Honor, that response to statement of claim was filed in July of 1986, I believe, which was within 11 months after we received Acmat's request for equitable distribution.

The preliminary numbers did receive some final revisions and if your Honor would accept we have an exhibit prepared, that is — it consists of the summary similar to what we had prepared before only these are the summaries prepared by MDC the outside consulting firm for the final numbers on those items where the Judge awarded money to Acmat.

THE COURT: The other thing was, it wasn't until Acmat asked for the 15 percent that I became apprised through the School District that the numbers I had used in the first judgment order might not have been accurate. I'll go through each one of these items.

I'm now proceeding — the Rush School. I'm looking at page six of the order of December 21, 1988, Item 16A. The Rush School.

MS. SHAFFNER: Your Honor, that was not a number on which you awarded extra — an extra amount to Acmat.

THE COURT: Item Two. I allowed the claim to the extent of \$388.52. Is there any change that's proposed by the School District? I think there is a change upward.

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MS. SHAFFNER: That number does not include overhead and profit.

THE COURT: Item Three, it's not at issue here.

Item Four, a claim of — the clean-up was allowed to the extent of \$4,583.92. Was 15 percent —

MS. SHAFFNER: 15 percent was not included on that item. The final MDC values that work at \$4,558.78, that amount includes overhead and profit and accounts for a change to the labor hours which were original — included in the original report which were not related to this item.

THE COURT: What is the basis for the difference?

MS. SHAFFNER: Labor hours which were excluded that related to an item that was not related to access in the platform area. The preliminary report had some hours that were submitted by Acmat which did not relate to this item.

So, in the final report when we recalculated the labor hours and added overhead and profit, the final amount was slightly less than what your Honor had ordered.

THE COURT: Are you saying there was a misrepresentation by Acmat in its submission?

MS. SHAFFNER: No. Actually, I believe on this item it was an error on the part of just putting an additional job sheet in which did not relate to these hours. It was not a misrepresentation by Acmat. I believe it was an error on the part of either — someone who put together the documents.

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THE COURT: I'll leave it as it is because that's not an error in document submission that is attributable to Acmat. If there was an error and it was an error — that's attributable to the School District. The figure will remain at \$4,583.92 plus 15 percent.

Item Five, it was \$22,576 which was allowed.

MS. SHAFFNER: Again, that amount did not include overhead and profit. The final MDC report had a final valuation which did include overhead and profit of \$18,057. The difference was attributable to a deduction in the final report which was a unit price deduction previously supplied by Acmat for the actual cost of asbestos removal.

Acmat was compensated for removing the enclosures but not for removing the asbestos itself behind the enclosures.

THE COURT: I'm confused. Acmat submitted a claim for asbestos removal for certain areas, and the final report disallows the certain work that the School District claims was within the scope of the original contract?

MS. SHAFFNER: It's a unit price deduction for the removal of asbestos itself. So, that would have been work within the scope of the contract.

THE COURT: I'll leave it as it is and award 15 percent.

Item Six, is that at issue?

MS. SHAFFNER: Again, the final report included an award of 7,000 or included a valuation of \$7,419.99. The final amount does include overhead and profit. Their reason that it is slightly lower than — that it is lower than the other amount is because there was a

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correction made for a material-cost item which was mistakenly included by the consultant the first time around.

THE COURT: I'll leave the figure as it and award 15 percent.

(Discussion off the record.)

THE COURT: Item Seven, was 15 percent included?

MS. SHAFFNER: 15 percent was not included, your Honor. The final MDC evaluation was \$1,915.20 which with the same labor time plus the 15 percent overhead and profit and included a unit price deduction of not having to perform similar work on the second floor — on the first floor as it was on the second floor.

THE COURT: I will leave it as it is and award 15 percent. Eight.

MS. SHAFFNER: Item eight does not include overhead and profit. The final report included an evaluation of Item Eight along with an evaluation of Item Eleven.

THE COURT: And what was the total?

MS. SHAFFNER: The total for the two items is \$5,638.45.

THE COURT: And the School District had originally calculated — I'll allow it. How much did I allow on that?

MS. SHAFFNER: \$18,817.28.

MR. DINEEN: That's for Item Eight alone, your Honor.

THE COURT: I will order \$18,817.28 plus 15 percent on Item Eight. And \$6,293.94 plus 15 percent on Item Eleven.

Item Nine is not an issue.

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Item Ten, \$3,335.20.

MS. SHAFFNER: That does not include a mark-up for overhead and profit. The final report does include 15 percent for overhead and profit.

THE COURT: And that comes to what?

MS. SHAFFNER: \$5,110.60.

THE COURT: Why the difference?

MS. SHAFFNER: I'm sorry. The additional difference is attributable to additional labor hours which were included in the final report that were attributable to this item.

THE COURT: And what's that? What's that figure again?

MS. SHAFFNER: The total amount \$5,110.60.

THE COURT: And that includes the 15 percent?

MS. SHAFFNER: And total labor hours.

THE COURT: And what was the amount before the 15 percent?

MS. SHAFFNER: In the final report, your Honor?

THE COURT: Pardon?

MS. SHAFFNER: In the final report?

THE COURT: Yes.

MS. SHAFFNER: \$4,444.

THE COURT: Again, please?

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MS. SHAFFNER: \$4,444.

THE COURT: I will award that amount, the higher amount.

Is Item Seventeen the next item?

MS. SHAFFNER: Yes, your Honor.

THE COURT: Why don't you step back a moment. There's a jury verdict which I'll take. It will take about five minutes, and then we'll resume.

(Recess, 1:55 p.m. to 2:00 p.m.)

THE COURT: Now, Item Seventeen, \$4,063.50 was allowed.

MS. SHAFFNER: Your Honor, in order to save time, I can represent that their overhead and profit was not included in any of the original numbers used by your Honor in the December 21st order.

We do have an objection to overhead and profit being added or do not know whether it was included on four specific items. If you would like to address those items.

THE COURT: On any of these items from — Rush School, Item Seventeen forward, were there any larger amounts that should have been allowed than those that were advanced on the statement relied upon by the Court?

MS. SHAFFNER: It's a smaller amount in Item Seventeen.

THE COURT: I'm sorry. Item Seventeen?

MS. SHAFFNER: Was a small amount.

THE COURT: All right. I'll leave that one as it is.

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MS. SHAFFNER: I'm sorry?

THE COURT: I'll leave that one as it is, \$4,063.50. Any other change?

MS. SHAFFNER: These are on amounts awarded by your Honor?

THE COURT: Yes.

MS. SHAFFNER: Item 25 is a smaller amount.

THE COURT: That will remain as it is.

MS. SHAFFNER: And then the remaining items, for Rush are the DECA decks and electricity costs. And we would have an objection to overhead and profit being added to those items and also have no basis for knowing whether Acmat did or did not add 15 percent to those items, since those were Acmat's numbers that were accepted by your Honor. That also applies to Item Number One in Lincoln.

THE COURT: Okay. Do you have any evidence, Mr. Dineen, that the Acmat submission did not include 15 percent. I believe I took that number from Acmat.

MR. DINEEN: Yes, your Honor, for example, the item on electrical. The Acmat —

THE COURT: Let's take the cost of the DECA decks.

MR. DINEEN: All right. Your Honor, there was a submission by Acmat in the sum of \$15,929.74. It was the amount awarded by the Court plus overhead and profit, that was the submission made to the School District.

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When the School District itemized the various Acmat extras it identified the number that Acmat was submitting its claim for without overhead and profit for some reason.

So, the number that the Court did award was the full net cost of the DECA decks but without the 15 percent overhead — excuse me — 15 percent overhead and profit which was part of the Acmat submission, which was contained in the letter of July 12, 1985 from Acmat to the School District? And the similar is true with respect to item —

THE COURT: Just a minute.

MS. SHAFFNER: With respect to the DECA decks the amount that was submitted in the submission to the Court was the amount of the bill. This was an item where Acmat had mistakenly ordered a product, a material for use, and the School District at one point agreed to purchase the item, the material itself from Acmat and we would just object to the imposition of overhead and profit on an item which was not used by Acmat in the prosecution of its work.

We agreed to a-dollar-for-dollar payment for that item and the amount of the invoice was only the \$13,000 and some dollar amount award by your Honor.

THE COURT: Anything else in this item?

MR. DINEEN: Only your Honor that having to go out and order the DECA decks was extra work, and under the contract if you do extra work and you don't agree on a price ahead of time, you're entitled to the net cost plus 15 percent for overhead and profit.

THE COURT: Why do you conclude those as extra work?

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MR. DINEEN: Because Acmat was not required to buy this product in the first instance. It was not its contractual requirement to do so. It went out at the request of the School District and performed this extra work.

THE COURT: That's not extra work. \$13,851.95 is awarded.

Item 31, electricity.

MR. DINEEN: Again, your Honor, the Acmat claim was submitted for \$11,546.35. The amount awarded by the Court was that number less 15 percent for overhead and profit. The Acmat submittal to the School District was for the sum of \$11,500. It does not include 15 percent for overhead and profit.

MS. SHAFFNER: There was a claim for each one of the schools submitted by Acmat for electricity. I don't believe that Fairhill and Lincoln included a mark-up by Acmat in their submission for overhead and profit. Those were just round numbers of \$10,000 with no back-up documentation.

The claim for electricity at the Rush School, I believe had — was the only one that had any invoices attached to it, but I still am not certain whether 15 percent overhead and profit was included after the tally of those invoices.

MR. DINEEN: The submittal by Acmat to the School District at Rush requested 15 percent for overhead and profit. The numbers at Fairhill and Lincoln are based on the cost at Rush. Identical work was done to supplement the electrical service at each one of those schools.

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The \$10,000 numbers at Lincoln and Fairhill do not include overhead and profit, similar to, they did not include overhead and profit with respect to Rush.

The invoice that was sent to the Rush School was for \$10,040.30 which is what the Court awarded plus 15 percent for overhead and profit which was not awarded.

MS. SHAFFNER: The School District has no evidence at all about what electrical work was performed at Fairhill and Lincoln.

THE COURT: At Rush?

MS. SHAFFNER: At Rush there were invoices that were submitted.

THE COURT: And under the contract if electricity costs were allowable with the 15 percent kick-in.

MS. SHAFFNER: I don't think that the provision of electricity — the School District contract provided that the School District would provide electricity but not that it would be extra work for the contractor to come in and put in whatever units it needed to for additional electrical service. That was a cost that was to be absorb by the contractor and not by the School District.

THE COURT: I rule electricity is not extra work.

MR. DINEEN: Your Honor, if I may be heard on this briefly?

THE COURT: You may.

MR. DINEEN: Your Honor, the evidence submitted to the Court on the summary judgment motion indicated, and prior to that time the various statements of claim, indicated not that it was something beyond which the School District had to provide in terms

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of electrical service. The problem with the electrical service in the schools was that it was inadequate. And the contract — in the contract the School District represents that it will furnish all necessary electrical power to the contractor.

If the service is inadequate, it is incumbent upon the School District to make sure that it is adequate so the contractor can do his work.

THE COURT: That's why he is being reimbursed this money, but you're not entitled to 15 percent as though it's extra work. Extra work implies that you've got to go out and hire some laborers to do some work that's beyond the scope of the agreement.

MR. DINEEN: That's exactly what they did.

THE COURT: This is not extra work. You're seeking reimbursement for that which the School District agreed to provide, and that's why you're entitled to \$10,040.30. It puts you in the position where you then, had you not had to supply the electricity, and that puts you — gives you all you're entitled to under the contract.

MR. DINEEN: Well, unfortunately the contractor was working without overhead and profit. He was working at cost for the School District, which is not what it agreed to do.

THE COURT: It's being reimbursed for that which the School District agreed to provide.

So, 15 percent will not be added to Item 30 and 31. It will be added to all other items under the Rush School, and I've changed Item 10 to reflect the net cost of \$4,444 and I've added 15 percent to that for a total of \$5,110.60.

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I've rejected the School District's present proffer of lower amounts in certain other items under the Rush School heading.

The Fairhill School.

MS. SHAFFNER: I believe that electricity is the only item at the Fairhill School on which your Honor awarded any money to Acmat.

THE COURT: Does the School District presently take issue with the award of \$10,000?

MS. SHAFFNER: Yes, it does. We take issue with the award of \$10,000 and any mark-up since we have no back-up documentation at all, and it was simply a round number provided by Acmat.

THE COURT: Is that correct, Mr. Dineen?

MR. DINEEN: As far as I know, your Honor, the amounts were based on the amount of work that was done at Rush School. The work at each of the three schools were identical in terms of increasing the electrical service to the buildings, and it is on that basis that the claims were formulated.

MS. SHAFFNER: Although, Acmat submitted invoices for the Rush School, it has submitted similar invoices for either Fairhill or Lincoln with regard to any electrical work.

THE COURT: The \$10,000 award is vacated for lack of submission of any documentation.

The Lincoln School.

MS. SHAFFNER: Your Honor, on Item Number One, the award to Acmat in the December 21st order was \$73,300. This was based on figures that were submitted by Acmat and not amounts that were calculated by the School District's consultants.

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The original MDC report had calculated the labor and materials at a much lower value and the final MDC had an even lower value than that awarded by your Honor.

THE COURT: Which was what?

MS. SHAFFNER: The final reports had the cost to Acmat of work in the toilet room at \$3,600 and then netted against that a credit to the School District for work which was not done in the faculty cafeteria in the amount of \$4,875. So, it resulted in a total net credit to the School District.

The original MDC report had concluded that the extra work was valued at \$20,071 minus a credit for not having done the work in the faculty cafeteria for a net amount of \$14,527.

MR. DINEEN: Your Honor, the amount awarded by the Court, \$73,300 was based on a written estimate prepared by Acmat in the sum of \$78,100 for a portion of the work covered by this particular item. The total Acmat submittal for the entire item was \$257,962. The written estimate that had been submitted by Mr. Nozko was for a much smaller scope of work which at some point was incorporated into the school, but in addition, other work was done as well.

Your Honor, did give the School District a credit in the sum of \$4,800 for work which was part of the contract and that is how the Court arrived at the \$73,300. To my knowledge, that does not include 15 percent for overhead and profit and I don't see any reason at this juncture to upset the award in its entirety or even partially.

THE COURT: Well, did your figure include 15 percent for overhead and profit, your proposal?

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MR. DINEEN: I don't believe so, your Honor. I think the proposal —

THE COURT: Is there any evidence that is did not? Most proposals do include that. I used your proposal number not the School District's allowance.

MR. DINEEN: Your Honor, the written estimate that was figured by Acmat at the time was based on unit prices in the contract. There is no specific reference to 15 percent for overhead and profit.

MS. SHAFFNER: Your Honor, the unit —

THE COURT: Well, on this item I construe this as the burden being on Acmat to show that the proposal did not include 15 percent for overhead profit, and from what you tell me, is not much showing me some documentation or proposal. The other proposals I have seen this case has concluded overhead profit.

MR. DINEEN: I would leave of the Court, your Honor, if I may submit to the Court at a later date a copy of the actual list of —

THE COURT: No, this is it. This is it. This is the final hearing on this matter. This has dragged on for too long.

MS. SHAFFNER: Your Honor, the School District continues to object to the use of any numbers provided by Acmat as estimates for the amount work performed.

In your December 21st order on those items where amounts were awarded to Acmat, the philosophy as such of the order was that you would predict what the School District would award to Acmat if the School Board had considered these items.

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THE COURT: I understand, but wasn't this an item where there was a handwritten proposal by Acmat which was approved by somebody from the School District, and the number of 78?

MS. SHAFFNER: There was a handwritten proposal. I don't know that that proposal was ever approved by anyone at the School District.

THE COURT: Do you have the document — do you have the proposal here?

MR. DINEEN: Your Honor, I don't have the proposal with me, but your Honor is correct, you remember correctly, it was a handwritten two-page document which set forth the various square footages of work to be done. The unit price from the contract and it came up with the number 78,100, and Acmat was directed to proceed with the work at that time, and in fact, the scope of the work is even increased thereafter.

MS. SHAFFNER: Your Honor, I was unaware before today that that proposal was based on unit prices, and if it was, the unit price additions that were provided to Acmat and to the School District, all the additions included overhead and profit. The unit price amount.

THE COURT: Any other bill?

MR. DENNIS: No, your Honor. I have a portion of the summary that relates to this item.

MS. SHAFFNER: As far as whether the School District had approved that estimate in the final written summary that we have here, there was an additional School District letter which clarified that the work was already include within the scope of the contract,

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with the exception of the toilet areas. That was a letter of November 5th, 1984 to Acmat.

THE COURT: I'll come back to that. Item Three.

MS. SHAFFNER: Item Three, did not include a mark-up for overhead and profit. The final report had concluded that it was within the contract and if not there were additional labor hours.

MR. DENNIS: Your Honor, my understanding is that the School District's present position is that the amount should be increased substantially from the \$1,132.74 to I believe \$3,838.70.

MS. SHAFFNER: And the final report concluded that the work was within the scope of the contract. We do have an alternative valuation which includes additional labor hours.

THE COURT: What do you mean alternative evaluation? He was within the contract or wasn't he?

MS. SHAFFNER:

No, we — your Honor, we requested the consultant in the event that something was already — we within the contract to come up with an alternative valuation since Acmat's claim for this item — I'm not sure what it was — but frequently it's much larger.

THE COURT: Assuming certain work — as I recall the submission, the School District acknowledged that certain of the work done would have qualified as an approved extra, and that was \$1,138.74 originally.

Now, are you saying that alternatively if you treat that as extra work, it would be valued at \$3,838.70?

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MS. SHAFFNER: If it's treated as extra work. Between the time that the preliminary report was prepared and the final report prepared there was a site inspection out at the school as a result of which MDC concluded that this work was within the contract. Within the scope of Acmat's contract.

THE COURT: And if it's not within the scope of the contract what's the value?

MS. SHAFFNER: \$3,838.70 which includes the 15 percent mark-up.

THE COURT: I'll award that amount. What is the net cost before the 15 percent?

MR. DINEEN: \$3,338.

THE COURT: What is it?

MR. DINEEN: 3,338.

THE COURT: All right. That amount plus 15 percent.

Item Nine, the electricity cost award is vacated.

We'll take a 15-minute recess while I deal with this item \$73,300.

MS. SHAFFNER: Your Honor, would you like the letter that I had referred to?

THE COURT: Yes. I'll also have to recapture my documentation and thoughts for that particular item.

(Recess 2:20 p.m. to 2:45 p.m.)

THE COURT: Please be seated. I don't have that proposal readily at hand. I'm sure —

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MR. DINEEN: Your Honor, I was able to locate a copy if you'd like to see it.

THE COURT: Okay. Then there was a letter dated July 19, 1984 from Mr. Krupinsky, director of design and entertaining services to Mr. Nozko, Sr.

In part it says, "Please proceed immediately with the work as outlined in your handwritten, breakdown submitted on July 18, 1984 at the conference with Dr. Rafferty."

The submission just handed to me by Mr. Dineen is that estimate and in brackets by each of the items is a figure for work. I had assumed that those were figures known to the School District at the time that Mr. Krupinsky wrote his letter. Anything from the School District?

MS. SHAFFNER: I think that letter is subsequent to the letters that your Honor is referring to, although Mr. Krupinsky said, proceed now on the time and material basis in his letter. He said you have to document the time and material that you spend on this. And in the additional School District's letters latter both went back and said, you're now submitting time that you're saying is extra work which was really within contract and that the actual time and materials submitted by Acmat were inflated.

So, I don't think that we can rely either on their estimate or the actual time and materials that were submitted. I think we have to go back and rely on what MDC has concluded was the actual verifiable time which was spent on these projects and that portion of the project that was outside the scope of the contract.

THE COURT: What was the School District's response to this item?

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MS. SHAFFNER: Which particular item?

THE COURT: Item One under the Lincoln School that was originally submitted.

MS. SHAFFNER: In its original submission?

THE COURT: Yes.

MS. SHAFFNER: In its original submission it said that the soffet and toilet rooms were — and locker rooms were additional work which totaled \$20,071 and that the faculty cafeteria work would have to be credited because it was never done to the School District which I think Acmat had also agreed to. So, the total calculation there was \$14,527. That included back-up documentation some of which was introduced at the trial that — through I believe Jack McKenna, that this work had actually not been performed.

We actually introduced an exhibit that was a memo at trial, that there were only two carpenters only working in an area where Acmat was claiming, you know, it spent a vast amount of time to do one project.

MR. DINEEN: Your Honor, may recall the testimony at the trial, not only from Mr. McKenna on cross-examination but from Mr. Nozko, Sr., to the effect that the entire area had to be completely staged for the asbestos removal and while the asbestos itself was not removed, Acmat was directed to go ahead and proceed with the work on a T&M basis.

The entire area was sealed. Decon chambers set up and that's where the expense came in. The cost of removing the asbestos is the minimal cost in that entire operation, and that was the extra work. And Mr. McKenna agreed that Acmat had gone ahead and done all

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that work, and at the very last second was directed not to go further. After they had completed all the work, other than the asbestos removal. That accounts for the difference, your Honor.

MS. SHAFFNER: Your Honor, the calculation by MDC not just the cost of removing the asbestos. It is also, in the original report, the cost of removing the soffit and I believe that there might even be material costs included in that. So, it's not just asbestos removal time that was included in MDC's report.

THE COURT: In the proposal, the student cafeteria, removed the ceiling tile, back room. The other was faculty lunchroom, removed ceiling tile. Two toilet areas. Prep and asbestos removal, student cafeteria, removal of two wooden soffets. Faculty cafeteria removal of one wooden soffit.

Now, what work do you say was not done?

MS. SHAFFNER: The faculty cafeteria work was not completed. There are additional letters to Acmat. I believe that the November letter was one of them later saying that when they went back to look at the contract drawings that the toilet areas were the only areas which were outside the contract drawings. So, those would have been the only areas that were extra. The faculty cafeteria also would have been extra since it was outside the area of the contract drawings but the work was not — actually, I take that back. I don't know whether the faculty cafeteria was originally in — within or without the contract drawing line.

THE COURT: I'll leave the figure as it is for the following reason. There is an acknowledgement that this was extra work for whatever reason, whether it was within the scope of the contract or because of the difficulty of the work. I don't know, but Mr.

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Krupinsky, acting on behalf of the School District, approved this as extra work on a time and material basis. There were estimates of how much time it would take and what the costs were. It was to be done on a time and material basis.

Assuming it was all within — all this work was outside the scope of the contract, excluding the faculty lunchroom, what was the School District's estimate of the time and material?

MS. SHAFFNER: That's the valuation that was included in the original MDC report.

THE COURT: Which was what? Is that the \$14,000 figure?

MS. SHAFFNER: It was actually a total, \$20,071 and then the deduction for the faculty area which was \$5,544 for a net amount of \$14,527.

THE COURT: So the figure was 20,000 what?

MS. SHAFFNER: No, net is 14,527.

THE COURT: What was the —

MS. SHAFFNER: If you exclude the faculty. You asked me to exclude the faculty cafeteria.

THE COURT: What was the total amount?

MS. SHAFFNER: The total amount was \$20,071.

THE COURT: And you deducted how much, \$5,000?

MS. SHAFFNER: 5,544.

THE COURT: They only estimated 4,800. I take it that they billed though 5,544 for the lunchroom?

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MS. SHAFFNER: I think that the \$5,544 is based on unit prices, not their estimate. I know that their estimate for that amount of work would be 4,800.

The 5,544 comes from a total — a calculation of the area multiplied by Acmat's submitted unit price list for deducting this amount of work.

THE COURT: Mr. Dineen, do you know how these numbers and different pen — and the estimate came to be on this sheet?

MR. DINEEN: Your Honor, I don't personally know how the numbers came to be on that sheet. My assumption would be that it's based on the square footage area as multiplied by the unit prices in the contract.

THE COURT: Well, what I mean is, do you know whether these were added after the meeting with Dr. Rafferty by Acmat or were they a part of the discussion with Dr. Rafferty?

MR. DINEEN: I do not know, your Honor. I would assume it was done with Dr. Rafferty.

Normally, if you give somebody an estimate you give them a price.

THE COURT: I will have to amend Item One, paragraph 18 of the Lincoln School. This was work that was to be done on a time and materials basis and not a lump-sum contract basis. To be consistent I'll have to follow the School District's evaluation of the work, and award it at the original allowance of 14,000 what was it?

MS. SHAFFNER: \$14,527.

THE COURT: Plus 15 percent.

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MS. SHAFFNER: That excludes overhead and profit.

THE COURT: It excludes it?

MS. SHAFFNER: It excludes it.

THE COURT: I will include 15 percent for overhead and profit. Anything else?

MS. SHAFFNER: I'd just like to hand up a motion that formalizing our request for reconsideration.

THE COURT: Okay.

MR. DINEEN: Your Honor, will it be necessary for Acmat to respond to this motion?

THE COURT: No, I've already reconsidered and made my rulings.

MR. DINEEN: Inasmuch as Acmat was not afforded the opportunity of putting in any opposing papers, we just want to note for the record our exception to the use of the MDC numbers as apparently standing for the position of the School District in this litigation.

The position of the School District was made known many years ago to this Court and has never been challenged until Acmat's request for overhead and profit on these various items.

THE COURT: The only number I'm using that's different — I've only used the original figures that have been supplied by the School District, except where they benefitted Acmat, if they were higher.

This 14,527 figure was from the original support —

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MS. SHAFFNER: It was.

THE COURT: — report, and that was part of your original submission, was it not?

MS. SHAFFNER: It was part of the original submission in the statement of claim and it was part of the original report.

I'd also like to make clear that Acmat had the final MDC expert report in-hand prior to your Honor's decision on the motion for summary judgment.

THE COURT: Okay.

MR. DINEEN: Well, I'm not sure what Acmat was supposed to do with that but —

THE COURT: Well, it doesn't make any difference. In terms of this proceeding, I've only used the original figures. And Acmat properly made a motion for reconsideration, and I've reconsidered each of these numbers. Each of these awards.

All right. That does it for December 21, 1988. Now, there was a motion for inclusion of the 15 percent on the jury verdict.

MS. SHAFFNER: I'm not — is that the motion that you just decided, your Honor? I'm not aware of any additional motion for the imposition of 15 percent on the jury's verdict.

MR. DINEEN: Your Honor, there was a request for an award of interest from the December 21, 1988 order on those amounts in favor of Acmat. Prejudgment interest.

THE COURT: For post-judgment interest or pre-judgment interest?

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MR. DINEEN: No, pre-judgment interest, your Honor. It was not a formal judgment entered in December of '88 it was an order. The amount due Acmat at that time had become liquidated and our understanding of Pennsylvania law is that Acmat would be entitled to pre-judgment interest on that amount from the date of the order.

MS. SHAFFNER: Your Honor, our position was that they should not receive interest from the date the order but from the date on which judgment is entered in accordance with that order and those figures have changed somewhat since then. So, we don't believe —

THE COURT: There was no final order. Indeed, it was not liquid in the sense that there was a trial to be held and based upon the trial result the final shake out would be determined, that is, the jury verdict should have been such that no money at all would have been due Acmat underneath here.

MR. DINEEN: Your Honor, my understanding of the situation is that on December 21st, 1988, we had one liquidated sum and an unliquidated sum yet to be determined perhaps in favor of the School District, perhaps not. So, in that sense certainly Acmat would be entitled to interest.

THE COURT: My intent was to determine those items that were then determinable as to what would be owed — finally would be determined by what remained to be tried.

So, that I'm clear. Your contention is that you're due interest on the contract sums from December 21, 1988.

MR. DINEEN: On those moneys that the Court awarded to Acmat in its order of December 21st, that's correct, your Honor.

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MS. SHAFFNER: Your Honor, those amounts are not liquid and indeed, would not be liquidated until today or whenever your Honor enters judgment, final judgment of what those final amounts would and what the net effect of it would be after the jury's verdict.

THE COURT: I agree. This is particularly so in light of the motion to reconsider or motion really to open the judgment for reconsideration of the calculations there, which I only did today, and I did so, because of good cause shown, that is, the non-inclusion of 15 percent. So, it was not a final liquidated appeal of an order. Now, on this award — All right. Anything else?

MR. DINEEN: No, your Honor.

MS. SHAFFNER: Nothing else.

THE COURT: Thank you.

(Court adjourned at 3:15 p.m.)

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

(signature)

Geraldine C. Laws

Laws Transcription Service

11/24/89

(date)

**APPENDIX H—BRIEF FOR
PLAINTIFF-APPELLANT-CROSS-APPELLEE
SUBMITTED TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

In The

United States Court of Appeals

For The Third Circuit

Nos. 89-1930 & 89-1953

ACMAT CORPORATION,

Plaintiff-Appellant-Cross-Appellee

vs.

SCHOOL DISTRICT OF PHILADELPHIA,

Defendant-Appellee-Cross-Appellant

**Appeal from the United States District Court
for the Eastern District of Pennsylvania**

**BRIEF FOR PLAINTIFF-APPELLANT-
CROSS-APPELLEE**

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**STATEMENT OF SUBJECT MATTER
JURISDICTION**

Jurisdiction over this action is conferred by 28 U.S.C. § 1332.

STATEMENT OF APPELLATE JURISDICTION

This is an appeal from a final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the District Court err in partially granting the School District's motion for summary judgment dismissing a majority of Acmat's claims as a matter of law, and in otherwise determining the amount of damages to which Acmat was entitled?

2. Did the District Court err in denying on the merits, Acmat's motion for reargument and reconsideration of the School District's summary judgment motion?

3. Did the District Court err in denying the contractually mandated markup of 15% for overhead and profit on certain of the items it allowed to Acmat?

4. Did the District Court err in denying Acmat its contract retainage as a matter of law?

5. Did the District Court err in its rulings, instructions, interrogatories to the jury, charges and answers to questions from the jury with respect to: (1) Acmat's entitlement to contract retainage and the School District's defenses thereto, 2) Acmat's entitlement to extensions of time and the number of days of time extension, and (3) the School District's claims of delay, contract completion and property damage?

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6. Did the District Court err in denying pre-judgment interest to Acmat? [1]

7. Did the District Court err in its rulings on evidence and admissibility of documents?

8. Did the District Court's charge to the jury contain improper statements of law?

9. Did the District Court err in its rulings, instructions and in the procedural conduct of the case generally?

10. Did the District Court err in denying Acmat's motions for a directed verdict in its favor?

11. Were the findings in the School District's favor improperly made?

STATEMENT OF RELATED CASES

Acmat Corp. v. Stewart Todd Associates, Inc., Docket No.
5759/86, Court of Common Pleas

Acmat Corp. v. Kaselaan & D'Angelo Associates, Inc., Docket
No. 6667/86, Court of Common Pleas

STATEMENT OF THE SCOPE OF REVIEW

Construction of a contract involves a question of law which is reviewable *de novo*. *Ram Construction Co., Inc. v. American States Insurance Co.*, 749 F. 2d 1049 (3rd Cir. 1984).

STATEMENT OF CASE

In this action for breach of a construction contract, equitable adjustment and quantum meruit recovery of damages, Acmat Corporation ("Acmat") appeals from the District Court's

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adjudication of its claims involving material and disputed issues of fact in a motion for [2] summary judgment and from portions of a final judgment entered after trial.

The present posture of this action is the result of the District Court's failure to understand its role on a motion for summary judgment and to comprehend the legal precedents that govern the rights and duties of the contracting parties.

The District Court summarily dismissed the majority of Acmat's claims as a matter of law and slashed the remaining claims to a fraction of their real value after accepting the School District's valuation of the work performed by Acmat. (116a)¹ The only claim of Acmat's that survived summary judgment was one for contract retainages in the sum of \$150,909.14. That claim, however, was initially excluded at trial by the District Court and then allowed at the conclusion of trial.

Acmat was relegated to the defendant's table and, in the end, was denied the contract retainages, as the District Court continued to make erroneous rulings of law. Thus, the only claims tried to the jury were the School District's belatedly asserted counterclaims and a restricted presentation of the issue of contract retainages.

The District Court shaped a verdict from Special Interrogatories answered by the jury and entered judgment in an amount that was later corrected upon motion by Acmat, in an amended final judgment.² The District Court did, however, continue to whittle away at the amount recovered by Acmat, as it partially granted the

¹ Numbers in parenthesis represent pages in the Appendix on Appeal.

² Counsel's conformed copy of the Special Interrogatories appears at page 2344a of the appendix. Verbal answers are at page 1758a.

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School District's post-trial motion for reconsideration of the 1988 summary judgment order. In the end, Acmat was only allowed recovery of the sum of \$91,964.40, which was a tiny fraction [3] of the damages it sustained in performing and completing the contracts.

STATEMENT OF FACTS

In or about April and June 1984, Acmat, a pioneer and leading contractor in the field of asbestos abatement, and the School District, entered into separate contracts for asbestos abatement at three school buildings in the City of Philadelphia. The schools are the Fairhill Elementary School, Lincoln Senior High School and Rush Middle School.

The Fairhill contract, dated April 16, 1984, was for a fixed price in the sum of \$446,000. (1967a) In June 1984, the School District unilaterally ordered a change in the specifications relating to air monitoring and work practices at the Fairhill School. School Board approval was obtained for the change in work and also for a unilateral increase in the contract price in the sum of \$18,000. (896a) The Lincoln contract, dated June 11, 1984, was for a fixed price in the sum of \$223,000. (2083a) School Board approval was obtained.

The Rush contract, dated June 11, 1984, was for a fixed price in the sum of \$595,000 and involved asbestos removal from the second floor only. (2197a) Thereafter, the School District elected to remove asbestos from the first floor of the Rush School and entered into a Supplemental Agreement dated October 30, 1984, for the sum of \$656,000. (2320a) That amount, however, was subject to adjustment based upon differences in conditions between the first and second floors. Formal School Board approval was obtained for the initial agreement and the Supplemental Agreement. The School

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District also elected to clean certain property stored in closets [4] and cabinets in the building. This work was not included in the original contract and the School District issued a change order with School Board approval. (890a) Although the change order in the sum of \$63,282.89, was executed by both parties, Acmat expressly reserved its right to seek additional compensation. (891a) The School District executed the change order, but unilaterally deleted the language inserted by Acmat. (892a)

All of the aforementioned contracts and unilaterally initiated changes ordered by the School District were approved by the School Board.

Acmat encountered differing site conditions during the performance of its work that caused significant increases in the amount of work it agreed to perform and in the cost of performance. The record is replete with correspondence and other documentation in which the School District acknowledged the additional work Acmat encountered due to the differing site conditions. Indeed, the School District, in many instances, ordered that the additional work be performed and even attempted to amicably adjust the compensation due Acmat for this work. The fact that claims could arise from differing site conditions was expressly contemplated by the parties in their agreements. See Article 14(c) of the Rush Contract for example.³

Other claims asserted by Acmat in its amended complaint involve the amount owed for work unilaterally ordered by the School District with School Board approval. Although Acmat was obligated to perform the work under the terms of the contracts, it was not at [5]

³ For ease of reference, citations to the construction contracts correspond with sections in the Rush agreement. (2197a)

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the mercy of the School District to accept whatever amount of compensation the School District deigned to give.

Another category of claims are based on work that Acmat asserts lie outside the scope of the contract. This is work that the School District ordered Acmat to perform in the mistaken belief that it was within the scope of the contract. This work was not the result of a unilateral decision of the School District to modify the scope of the contract pursuant to Article 14(a) of the contract, but was insisted upon by the School District in the erroneous belief that it was included in the contract. Even the most cautiously drafted construction contract will include terms and drawings that may be interpreted differently by parties to the agreement. Interpretation is often based on custom and usage in a particular trade. The claims that come within this category are the result of a common law breach of contract and there is no procedure in the contract for their resolution. They are compensable against the School District in accordance with the common law, as they would be against any party that breached a contract. The School District's improper administration of the contract and interference with Acmat's work also gave rise to claims for breach of contract. A prime example is the unreasonable inspections, tardy inspections and late reporting of test results that delayed Acmat and caused it to perform more work. Other examples are conflicting and late directions to do work and loss of efficiency caused by the School District's refusal to heat the Rush School in the winter.

Still other claims are based on the increased costs caused by the School District in disrupting and delaying the performance of the contracts.[6]

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An additional claim is for the contract retainages that were withheld by the School District in the sum of \$150,909.14.

In response to Acmat's suit for damages, the School District counterclaimed for delay damages and for work that was allegedly omitted or improperly performed.

Procedurally, the action was commenced in 1985 with the filing of a complaint that was later amended. (12a) The School District was apparently able to forestall the filing of an answer until 1987, when it only answered Count VIII of the Amended Complaint and asserted its counterclaims. (55a)

In 1988, the School District filed its motion for summary judgment which culminated in the District Court's order dated December 21, 1988. (116a) The order dismissed the majority of Acmat's claims and accepted the School District's determination of the value of the surviving claims. Acmat's motion for summary judgment dismissal of the School District's counterclaim on the grounds that it was pursuing both actual and liquidated delay damages was denied, because of the School District's election to pursue a claim for liquidated delay damages instead of actual delay damages. Acmat's only remaining claim was for contract retainages which was also rejected immediately before commencement of trial. Acmat's motion for reconsideration was likewise denied on the merits. (880a-921a)

Trial commenced on the School District's counterclaims on July 5, 1989, with Acmat literally relegated by the District Court to the role of defendant. This is the reason why Acmat's trial exhibits bear a defendant's label. The School District was permitted on the first day of trial to switch from its prior election of pursuing liquidated delay damages to now claim actual [7] delay damages.

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(1006a-1011a) The trial proceeded for the next twelve days with the jury answering Special Interrogatories on July 17, 1989. The Court thereafter shaped its own verdict. Interestingly, at the end of the trial, the District Court reversed its earlier ruling and allowed Acmat to make an extremely limited presentation of its claim for contract retainages. The record shows that Acmat was hampered throughout the trial by rulings that greatly curtailed its presentation of evidence, particularly with respect to issues relating to Acmat's entitlement to extensions of time.

The jury's responses to the Special Interrogatories acknowledged the fact that the School District was responsible for numerous and repeated breaches and interferences. The jury found, for example, that Acmat was entitled to substantial extensions of time at the Fairhill and Lincoln Schools and a complete extension of time at the Rush School. This finding was made in spite of the Court imposed standard of arbitrariness on the School District's conduct. In addition, the jury reduced the School District's claims for property damage and completion costs to a small fraction of their alleged value. Notwithstanding the District Court's severe limitations on Acmat's ability to defend the School District's counterclaims, the jury only awarded the School District approximately ten (10%) percent of the alleged value of its claims. Moreover, the grounds asserted by Acmat in support of its entitlement to time extensions, i.e., breaches of contract by the School District, extra and additional work and differing site conditions, were found by the jury to have been established by overwhelming evidence.

A Final Judgment was entered on September 11, 1989 (2358a), but was later amended because it understated the amount [8] due Acmat. In fact, the original Final Judgment incredibly had Acmat

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owing money to the School District. The Amended Final Judgment was entered on October 24, 1989. (2400a)

The Amended Final Judgment also reflected the partial granting of the School District's belated post-trial motion for reconsideration of the December 21, 1988 order. The Court reduced the amount that Acmat would otherwise have received after a hearing on September 6, 1989. (2380a) Acmat's post-trial motion for the addition of a 15% markup was only partially successful, as the District Court allowed the contractually mandated markup for a portion of the items. (2394a)

The Notice of Appeal was entered on or about October 30, 1989 (1a) and a Notice of Cross-Appeal was entered on or about November 6, 1989. (2a)

ARGUMENT**POINT I****ADJUDICATION OF ACMAT'S CLAIMS IN A
SUMMARY JUDGMENT MOTION IS
REVERSIBLE ERROR**

The law is clear that summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of Fed.R.Civ.P. In evaluating a motion for summary judgment, any doubt over whether there is a genuine issue of material fact *must* be resolved in favor of the non-moving party. *Housing Corp. of America v. United States*, 468 F. 2d 922, 924 (Ct.Cl. 1972). In addition, any doubt, issues of credibility and the inferences to be [9] drawn from the facts must be viewed in the light most favorable to the party opposing the motion for summary judgment. *Adickes v. Kress & Co.*, 398 U.S.

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144 (1970), quoting *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

A review of the summary judgment order dated December 21, 1988 (116a), the transcript of argument of the initial motion (74a) and the one for reconsideration (926a), shows a consistent misapplication of the contractual terms and Section 5-508 of the Pennsylvania Public School Code of 1949, 24 P.S. § 5-508, to the facts of this case. Issues of material fact and public policy clearly precluded the entry of summary judgment.

It is well settled that summary judgment must be denied when there is more than one permissible inference of the intent of the contracting parties. When that occurs, the question of intent becomes an issue of fact for the jury. *Bear Brand Hosiery Co. v. Tights, Inc.*, 605 F.2d 723 (4th Cir. 1979). Moreover, an ambiguous contract must be construed against the draftsmen and permits the introduction of parol evidence. *Consolidated Tile and Stone Co. v. Fox*, 410 Pa. 336, 189 A. 2d 228 (1963).

The District Court clearly went beyond the role of determining whether or not questions of fact existed and actually decided disputed questions of material fact. 6 Moore's Civil Practice Para. 56.04 [1].

School Board approval of the contracts was properly obtained to the extent required by the School Code. Moreover, contrary to the District Court's findings, the operative provisions of the contracts are ambiguous or void as against public policy.

More than once, the District Court stated that it would not permit Acmat's case to proceed because it interpreted Article [10] 14 of the

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contracts and the School Code as making the School Board or School District the final arbiter of Acmat's claims.

In its order of December 21, 1988, the District Court wrote in pertinent part:

Work directed to be undertaken by ACMAT on a time and material basis was subject, by contract language, to the School District's final determination as to net costs of labor and material. Thus, the claims for time and material costs are not subject to judicial review. The School District's contractual right of final determination necessarily includes the form and extent of proof and actual expenditures by the contractor ... (120a)

Consequently, the Court endorsed a procedure in which one party to a contract had the right to adjudicate the claims of the other without any judicial review. See also, pages 102a-103a, 940a-942a, 947a, and 957a of the appendix. It is submitted that such an approach is entirely improper and is not in accord with the parties' intentions. Moreover, enforcement of the clause in the manner sanctioned by the Court is against public policy.

The reality of a construction project is that despite the many hours of planning by design professionals and construction experts, contingencies arise that require changes in the methods and manner of performance by the contractor. The contracts as approved by the School Board contemplated changes in work and set forth procedures for dealing with a number of contingencies. The particular provision to be utilized depends on the cause of the changed work.

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Article 14 sets forth the following terms:

- (a) The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes [11] cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in contract price being subject to the approval of the Board.
- (b) The determination of the increase or decrease in compensation to be paid to the contractor for additions to or reductions in the work, respectively, shall be determined by application of unit prices when such are set forth in the Special Conditions of the contract, or, in those cases where unit prices are not applicable, by a lump sum mutually agreed upon by the Board and the contractor. If however, unit prices are not applicable and if the parties cannot agree upon a lump sum, then additional compensation to be paid the contractor shall be determined by the actual net cost in labor and materials, plus fifteen percent (15%) for profit and overhead. Reductions in the contract price in the form of credits shall be determined by the actual net cost in labor and materials if the aforementioned lump sum cannot be agreed upon. The fifteen

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percent (15%) for profit and overhead will be retained by the contractor. The School District will make the final determination as to net cost of labor and materials.

- (c) Should the contractor encounter subsurface and/or other conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the School District of such conditions, before they are disturbed. The School District will investigate the conditions and if it finds that they materially differ from those shown on the drawings or indicated in the specifications, it shall make such changes in the drawings and/or specifications as it may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes.
- (d) Verbal instruction given by any of the officers, agents, or employees of the Board which depart from the contract documents shall not be binding upon the Board. [12]

A. Article 14(a) is a unilateral changes clause

It is incontrovertible that Article 14(a) permits the School District, subject to School Board approval, to order unilateral changes in Acmat's work. There is, however, at the very least, an issue of fact about whether the parties intended to leave the question of compensation in the hands of the School District.

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Provisions such as Article 14(a) are unique to construction contracts because they allow the owner to issue unilateral orders directing a deviation from the contract that has already been assented to by the parties.⁴ However, a unilateral change will still permit the contractor to seek additional compensation when it believes that the adjustment allocated by the owner is insufficient. Article 14(b) deals with equitable adjustment of compensation when changes to work have been made in accordance with Article 14(a).

The first claim to arise under Article 14(a) was Change Order No. 1 to the Rush School contract. The School District elected to clean the personal property stored in closets and cabinets and it directed Acmat to do the work pursuant to Article 14(a). School Board approval was obtained and Acmat became obligated to perform the work. If it refused, the School District could have terminated Acmat for default, which it threatened to do during the project on such grounds. Although a "proceed order" could have been issued at that point, the School District attempted to make an agreement with Acmat for the fixed price of \$63,282.89 and issued a change order for its signature. Acmat balked at the [13] price and reserved its right to seek compensation for the obvious additional expense and so stated in the change order. (890a, 891a) Thus, Acmat was asserting its right to seek an equitable adjustment under Article 14(b) when no agreement could be reached on a lump sum change in contract price. However, the School District unilaterally crossed out Acmat's language and stated that it had the absolute right to dictate the price to be paid for the change. (892a) Thus, it is clear that there was no "meeting of the minds" as to the price for this change and Acmat proceeded with the work in accordance with Article 14(a) of

⁴ Paragraph 14(a) refers only to changes by the School District and makes no mention of assent by Acmat.

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the contract. (883a) The claimed amount for performing this work is in the sum of \$148,398.22.

The second claim arising from additional work unilaterally directed by the School District and approved by the School Board was at the Fairhill School. According to the evidence, the Board approved the addition of a work practices supplement to the contract. (896a) However, there was no change order showing Acmat's assent to a price. The documentary evidence shows only an unrelated proposal by Acmat to apply one coat of encapsulating sealer at soffits for the sum of \$18,000. (873a) It does not show an agreement to perform sealer work for a fixed amount and certainly does not show an agreement to 23 pages of work practices at any price. In the final analysis, Acmat was required by Article 14(a) to perform in accordance with the work practices supplement, but there was no agreement to a price. (883a-884a)

At the very least, issues of fact exist as to whether Acmat agreed to perform the aforementioned items at the fixed price claimed by the School District. The District Court, however, was unconcerned about this issue since it construed Articles 14(a) and [14] 14(b) as requiring Acmat to accept whatever amounts the School District elected to pay. Indeed, under the District Court's interpretation, huge amounts of additional work could be ordered at no cost to the School District and without any recourse to the courts.

However, an analysis of the pertinent provisions of Article 14 shows that many ambiguities are present and that the District Court misconstrued the true intent of the parties. Article 14(a) states that an equitable adjustment shall be made for changes and then goes on in Article 14(b) to set forth three types of calculations for adjustment of compensation.

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The first part of Article 14(b) allows utilization of unit prices, but there were none applicable to the aforementioned items of work or any of the claims. The second method of adjustment is a mutual agreement to a lump sum. The final method for calculating an adjustment in compensation is the actual net cost of the work, plus 15% for profit and overhead. It is this third method that is applicable to Acmat's claims and that allows Acmat to have its claims adjudicated in court.

Unfortunately, the District Court failed to recognize the distinctions and ambiguities in Article 14 or understand that the provision making the School District the final arbiter of net costs did not preclude adjudication of the issue by a civil court and jury. Indeed, the District Court's construction is the least plausible of all the meanings that could be given the contractual provisions.

In *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super Ct. 425, 460 A. 2d 260 (1983), the plaintiff was seeking an equitable adjustment in addition [15] to the amount already paid by the School District on account of work that it was directed to perform. Language identical to that under review herein with regard to the finality of School District decisions did not preclude the contractor from offering proof of additional changes.

In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor.*

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John F. Harkins, supra at page 265. Emphasis supplied.

The adverse decision in *Harkins*, supra, was due to the plaintiff's failure to satisfy its burden of proof and not because of any contractual bar to its claims. The point is that the courts have interpreted this provision as allowing the contractor to prove by a fair preponderance that its damages exceed the amount allowed by the School District. Although clearly obligated to apply the law of Pennsylvania as interpreted by the courts of the Commonwealth, the District Court failed to do so in this case. *Rees v. Mosaic Technologies, Inc.*, 742 F. 2d 765, 767 (3rd Cir. 1984).

It is also significant that an interpretation of the contract making the School District judge and jury over the amounts to be paid the contractor for additional work would make the provisions void as against public policy. The Pennsylvania Supreme Court has clearly held that it is unconstitutional to commingle judicial and prosecutorial functions. *Dussia v. Barger*, 466 Pa. 152, 351 A. 2d 667 (1976).

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 340 (1968), the Court held: [16]

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

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The instant case is not one where a third party with some bias has been selected to adjudicate a dispute, but is actually one in which a party to the contract can have its way with the other.

Moreover, it is submitted that the District Court's decision allowing the School District to make unilateral decisions regarding costs violates principles of due process. If allowed to stand, Acmat will have been denied its right to a "full and fair" hearing. Indeed, it will have received no hearing. Nowhere in the contract did Acmat agree to waive its constitutional right to adjudication in a court of law. The District Court's statement that this approach is most practical has no support in the contract. (941a) As a matter of fact, it is likely that the District Court's interpretation will cause contractors to avoid bidding government work if the scope of work and the amount paid therefor can be unilaterally determined by the other party to the contract. School District contracts are after all adhesion contracts let under a public bidding statute. 24 P.S. § 7-751. This was a concept lost on the District Court since it believed Acmat could negotiate the terms of the contracts. (119a, 939a-940a)

Summary judgment was also improper because of the many ambiguities in Articles 14(a) and 14(b) regarding sums to be paid. The phrases "equitable adjustment", "contract price", "increase or decrease in compensation", "net cost", "unit price" and "lump sum" [17] are used throughout Article 14 and were interpreted by the Court as having the same meaning. This was clearly wrong as each term has a different meaning in the construction industry, a fact which Acmat was denied the opportunity to develop at trial by reason of the District Court's granting of summary judgment.

It is submitted, for example, that contract price as used in the contracts does not refer to all manners of equitable adjustment, but

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only to lump sum changes in contract price. Obviously, unit prices, had they been applicable, would not require further assent by the School District or approval from the School Board because such endorsement would already have been received as part of the original contract. The final sentence of Article 14(b), as interpreted by the District Court, is void as against public policy. Moreover, there is an ambiguity regarding whether the sentence refers to both increases and decreases to the contract.

It is submitted that Article "14" is riddled with ambiguities that require adjudication by the trier of fact.

B. Article 14(c) is a differing site condition clause that governs the changes that were unexpectedly encountered at the project.

The agreements contain a differing site condition clause in Article 14(c) that is designed to deal with conditions that differ from those set forth in the contract documents or that are normally found in construction. It has nothing whatsoever to do with changes within the scope of the contract that are unilaterally ordered by the School District pursuant to Article 14(a).

Differing site condition clauses became commonplace in government contracts during the last 25 years in order to reduce the cost of construction, as government entities found that they [18] could save money on their overall expenditures for construction if they contracted for work without a markup for contingencies. The differing site condition clause allows a contractor to bid a project safe in the knowledge that it will be equitably compensated, if and when a differing site condition arises.

It is well documented that Acmat encountered conditions on these projects which were different from what was described in the plans

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and specifications and different from anything else it had experienced in its long history as an asbestos abatement contractor. (1335a)

The District Court essentially abrogated the differing site condition clause in holding that Article 14(c) is modified by the language in Article 14(a) that requires School Board approval. This interpretation was rejected by the Pennsylvania Supreme Court in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A. 2d 306 (1964). In *Teodori* an excavation contractor encountered a differing site condition that caused it to perform additional work and to experience a delay. The contractual language was very similar to the wording used by the School District in the case at bar. The contract contained a differing site condition clause, an extra work provision and a section for computing payment for extra work. The Court found that the differing site condition clause was separate and apart from the provisions for extra work.

The following pertinent remarks were made by the Supreme Court of Pennsylvania:

Authority next argues that the contract between the parties provided no agreement to pay for extra work in the amount claimed by Teodori. This contention is based upon the "Changes and Alterations" section of the contract, which clearly provides that such "changes and alterations" be made by written order. This argument completely ignores the section of the [19] contract dealing with "Conditions Differing From Those Shown On Plans or Indicated In Specifications", set forth in full above. The parties obviously contemplated the possibility of the exact

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type of contingency which arose, and provided for it in the contract.

We agree with the conclusion of the Court below, that Teodori's right to extra compensation, if any, is governed by the "*differing conditions*" clause, and not by the "changes and alterations" clause, the extra compensation not being sought for "changes" and/or "alterations" as those terms were used in the contract.

Nor are we moved by Authority's argument that the award of extra compensation is contrary to the provisions of the School Code or Municipality Authorities Act ...

The contract in the instant case was entered into under circumstances which fully complied with the above statute. The extra work which the plaintiff was required to do and upon which his claim is based was a natural extension of the quantum of the work contemplated by the original contract and was clearly covered by an express provision thereof. No work not encompassed in the original contract was presented by discovery of the gasoline line, and thus no physical changes or alterations in the contract documents were necessitated thereby. The end product of the site preparation remained exactly as originally planned; only the manner of accomplishing it was affected. The contract unequivocally provided for this contingency, and the plaintiff had a clear contractual right to adjust his method of operation and to recover his additional costs within the contract framework.

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Here, the contract foresaw the possibility of what actually occurred, and Teodori complied with the governing provisions of the contract ... *Teodori v. Penn Hills School District Authority*, 196 A. 2d at 309. Emphasis supplied.

Thus, it is quite apparent that the provisions for additional work caused by differing site conditions are independent from those governing additional work under the changes clause in Article 14(a). The only link between Articles 14(a) and 14(c) is that the amount to be paid for additional work is to be calculated [20] in accordance with Article 14(b). Article 14(c) specifically states that "[a]ny increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes." This is clear reference to Article 14(b).

Accordingly, Articles 14(a) and 14(c) are separate and distinct from each other. Changes that are caused by differing site conditions do not require separate School Board approval and need not be in writing. *Teodori v. Penn Hills School District Authority*, *supra*.

The District Court simply failed to recognize that a second approval by the Board was unnecessary since the contracts with this clause had already received the proper endorsement. Nor was there any requirement that instructions be in writing. The fact of the matter is that the School District time and again, verbally and in writing, ordered that the work due to differing site conditions be performed. (487a-489a)

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C. The site inspection clauses have no bearing on the claims asserted by Acmat.

Reliance by the District Court on the site investigation clauses of the contracts to nullify Article 14(c) was also misplaced. (119a) It is submitted that the courts are reluctant to read such exculpatory clauses broadly and to relieve owners of their liability for changed conditions. An interpretation that shifts the risk of differing site conditions to the contractor would render Article 14(c) meaningless and undermine the very reasons for its inclusion in the contracts. It must be remembered that differing site condition clauses were inserted by government entities to reduce the cost of construction. An interpretation that [21] voids Article 14(c) by shifting the burden of finding unforeseeable conditions to the contractor would allow an owner to reduce a contractor's price and then deny an equitable adjustment when a differing site condition is found. See *Town of Longboat Key v. Carl E. Widell & Son*, 362 So. 2d 719 (Fla. Dist. Ct. App. 1978).

In *United Contractors v. U.S.*, 368 F. 2d 585, 598 (Cl. Ct. 1966), the Court wrote the following:

But we have held, in comparable circumstances, that broad exculpatory clauses (identical in effect with this one) cannot be given their full literal reach, and 'do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.' *Fehlhaber Corp. v. United States*, 151 F. Supp. 817, 825, 138 Cl. Ct. 571, 584 (1957), cert. denied 355 U.S. 877, 78 S. Ct. 141, 2 L.Ed.2d 108. As *Fehlhaber* said, general portions of the specification should not lightly be read to override the Changed Conditions clause. *Ibid.* It takes clear and

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unambiguous language to do that, for 'the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application * * *.' *Thompson Ramo Wooldridge Inc. v. United States*, 361 F. 2d 222, 238, 175 Cl. Cl. ____, ____ (1966).

In *U.S. v. Spearin*, 248 U.S. 132, 137 (1918), the Supreme Court held:

But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume the responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging [22] rights arising under specific provisions of the contract.

Similar situations have also been reviewed by government boards of contract appeals which have special expertise in dealing with construction matters.

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In *M. A. Mortenson Co.*, ASBCA No. 32918, 87-1 BCA ¶ 19,598 at pgs. 99,130, 99,131 (1987), the Board wrote:

We have found that the Electrical Distribution drawings, coupled with a reasonable site investigation, would not have alerted appellant to the need for concrete and asphalt removal in addition to that required and specifically delineated in the removal drawings. Accordingly, even if the Government's contention, that appellant has the obligation to carefully review the entire contract for areas of concrete removal in addition to those specifically set forth, is correct, it is simply not applicable in light of our key finding.

See also, *Farnsworth & Chambers Co., Inc. v. U.S.*, 346 F. 2d 577 (Cl. Cl. 1965).

Nor is the law different in Pennsylvania. Cases cited by the School District in support of summary judgment involve situations where the owner expressly stated that contract documents were not to be relied upon by the contractor and where the contractor expressly assumed all risks from conditions at the site. The contractor was placed on notice that it had to fully analyze the conditions at the site.

The 1955 contract at issue in *Montgomery v. City of Philadelphia*, 391 Pa 607, 139 A.2d 347 (1958), did not contain a differing site condition clause. Moreover, the agreement expressly eliminated certain tests from being a part of the agreement and stipulated that the contractor assumed the risk resulting from differing site conditions. The contract even included a *caveat* [23] *emptor* type provision that "the contractor shall accept the site as he finds it".

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Likewise, it is apparent that the contract at issue in *Nether Providence Township School Authority v. Thomas A. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), did not contain a differing site condition clause. It too placed full responsibility for knowing the conditions of the site on the contractor.

Such is not the case in the matter at bar. The agreements refer to and incorporate the drawings and specifications for the project. Although the agreements contain two site inspection clauses, they are vague and unspecific. They certainly do not shift the risk of conditions at the site to Acmat. Indeed, there is no indication that the site investigation clauses were ever intended for this purpose.

The first inspection clause is contained in paragraph 7 of the General Conditions and states the following:

7. CONDITIONS AFFECTING THE WORK

- (a) The Contractor shall be responsible for ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the School District. The School District assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the receipt and opening of bids other than by a bulletin or addendum that is duly issued.
- (2242a)

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The second site inspection clause is contained in Article SC-07 of the Special Conditions and reads as follows:

SC-07 EXAMINATION OF THE SITE

The contractor bidding on this work must inspect the sites before submitting the proposal and [24] will be responsible for informing himself fully *on all determinable*, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same. Emphasis supplied. (2271a)

Apart from the ambiguity created by having two site inspection provisions in different parts of the agreement, it is clear that the clauses read alone or together do not require the type of exhaustive site inspection that the School District now wishes to retroactively impose upon Acmat. Essentially the two clauses require the type of inspection in which a prospective bidder visually ascertains the physical limitations of the project that are patently apparent. They do not require penetrations into the walls and ceilings. The latter clause is significant in using the words "determinable, existing conditions". Obviously, the clauses were intended to be compatible with the differing site condition clause referred to earlier. Simply put, the site inspection clauses do not shift responsibility to the contractor to learn of every hidden condition that may be lurking behind the walls and ceilings of the building, including conditions that are unknown to the owner. This is especially the case where the contractor is relying on a contractual provision to compensate it for unknown conditions. This interpretation is even more compelling in the situation at bar where the conditions existed in a fully constructed building. In this instance, it seems that the full

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investigation required by the District Court would have required demolition of existing structures and uncontrolled release of asbestos into the atmosphere. There can be no serious doubt that the School District would have forbidden the very type of inspection it claims Acmat should have performed. [25]

It is respectfully submitted that Acmat must be judged by what a reasonable contractor experienced in the field of asbestos abatement would have done and that is a question for the trier of fact. See *Stock & Grove, Inc. v. U.S.*, 493 F. 2d 629 (Ct. Cl. 1974).

The ambiguities in the agreement, the differing site condition clause and the issue of whether a contractor conducting a reasonable site inspection would have discovered the differing conditions all should have precluded the award of summary judgment. The Dalton affidavit and Lord affidavit clearly show that the unusual conditions discovered as the project progressed could not have been detected by a reasonable site inspection. (897a-908a)

Many of Acmat's claims involve differing site conditions. One example that resulted in substantial additional costs to Acmat was asbestos overspray at the schools. Page 1010-1 of the specifications of the Rush contract summarizes the work to be performed and indicates that it is above the ceiling line and only in the areas located on the drawings furnished by the School District. (2274a)

Much of the asbestos overspray was found below the ceiling line and in areas not shown in drawings. Acmat was not engaged to remove all the asbestos in the schools, but only that required in its contract documents. At the Lincoln School, for example, Archway Contracting was engaged to perform asbestos removal on the second floor. (1379a, 1770a)

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It is respectfully submitted that the question of whether the aforementioned work constitutes a differing site condition is a question of fact for the jury. They must determine whether a [26] reasonable contractor under these circumstances would have foreseen the changed conditions experienced by Acmat.

Another error committed by the District Court was its interpretation of the supplemental agreement adding the first floor to the Rush School. Since the proposed work was outside the scope of the original contract, a new agreement and approval of the School Board was obtained to satisfy the requirements of 24 P.S. § 5-508. (2320a-2322a) The July 3, 1984 letter, which is incorporated into the agreement, sets forth the sum of \$595,000 for those conditions that are the *same* as those on the second floor and the further sum of \$61,019 for additional items on the first floor which were *found* to exist at that time. (2321a)

Robert F. Sullivan's memorandum to the file dated July 3, 1984, explains that the gym, auditorium and kitchen areas had been identified on that date as different and they were treated as *major added* costs and assigned a price. (888a) The price was not, therefore, the total amount for the first floor. Any other conditions at the site that differed from the second floor were to be treated as differing site conditions under Article 14(c).

Thus, the parties anticipated that different conditions than those identified could be encountered on the first floor of the Rush School and would result in an appropriate adjustment in price. They were uncertain as to what conditions existed and in effect agreed that they should be treated as differing site conditions pursuant to Article 14(c). For the reasons discussed previously and on the basis of the

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foregoing argument, the site inspection clauses also have no bearing on the work performed on the first floor of the Rush School. [27]

Issues of fact exist and the summary judgment was improper. The amount to be paid for differing site conditions is set forth in Article 14(b).

POINT II

**THE CLAIMS FOR BREACH OF CONTRACT ARE
ENTITLED TO ADJUDICATION UNDER COMMON
LAW PRINCIPLES AND SHOULD NOT HAVE BEEN
SUMMARILY DISMISSED**

Many of Acmat's claims arise under principles of common law breach of contract.

The District Court erroneously concluded in its order of summary judgment that the common law breach of contract claims were barred by the contract and the School Code. (116a)

While the School Code requires School Board approval upon entering into contracts, it is ludicrous to interpret the statute as requiring School Board approval as a prerequisite to suit for breach of contract. Moreover, none of the contract provisions govern claims made for common law breach of contract. The District Court, however, failed to recognize the distinctions between claims made for equitable adjustment under Article 14 and those for which compensation is allowed as a matter of law. If allowed to stand, the District Court will have imbued the School District with the type of immunity from suit that the legislature has refrained from enacting into law.

*Appendix H***A. Acmat is entitled to damages for work performed beyond the scope of the contract.**

It is not unusual for parties to a construction contract to disagree over whether certain work directed by an owner is included or excluded from the scope of the contract. After all, [28] the contract documents, which include a form of agreement, general conditions, specifications and drawings, are often subject to interpretation during the pendency of a project. A claim arises when the parties cannot agree to whether work is included in the scope of their contract. In such cases, a contractor will often do the work under protest and assert a claim. *Williston on Contracts*, Vol. 3, rev. ed. § 704, at page 2027; *Shalman v. Board of Ed.*, 31 A.D.2d 338, 297 N.Y.S.2d 1000, 1003 (3rd Dept. 1969).

Nevertheless, the District Court rejected this familiar principle of law and suggested that Acmat should have stopped its work and sought a judicial declaration each time a breach occurred. (87a, 119a)

Protest work is not a claim for extra compensation under the terms of the contract, but is a claim for breach of contract. Therefore, it would be inappropriate to impose a requirement that School Board approval be obtained prior to suit on these claims. It is unlikely that approval would ever be forthcoming and it would be analogous to asking a breaching party to a contract for permission to sue.

The District Court without any basis in law rejected the concept of protest work and elected to punish Acmat for not stopping work and compelling the School District to commence an action against it. (87a) The District Court failed to realize that 24 P. S. § 5-508 only provides for School Board approval upon entering into

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contracts. It does not require approval as a prerequisite to a contractor's action for breach of contract.

Another aspect of the breach of contract claim deals with the manner in which the School District managed the contracts. The School District unreasonably interfered with construction by failing [29] to heat the premises, allowing the elevator to stop functioning, conducting improper inspections and reinspections, conducting late inspections and issuing defective plans and specifications. The School District's interference with Acmat's work is well documented. It is clear that an owner may not impede the progress of a contractor. Yet that is precisely what the School District did when it belatedly ordered the cleaning of closets and rails at the Rush School after the area was fully cleaned. (898a-899a) As a consequence, the entire floor became recontaminated and had to be recleaned at great additional expense and time. The failure to heat the building caused flooding and additional cleaning. School District personnel contaminated restricted areas by entering them without taking appropriate precautions. There were late test reports and delayed responses when directions were requested. (902a-904a, 1462a-1463a)

Clearly, the School District impeded progress and interfered with the planned sequence of work at the project. Indeed, the jury's responses to the Special Interrogatories granted Acmat a complete extension of time at the Rush School and substantial extension of time at the Fairhill and Lincoln Schools show the merit to Acmat's claims. Acmat is entitled to just compensation for these breaches of contract.

Perhaps most egregious was the arbitrary and capricious way in which the School District conducted its inspections. While the

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agreements provided for inspections it is alleged that they were conducted in an unreasonable manner. Initially, it is noted that the specifications were defective. The requirement of many air [30] exchanges a day while at the same time requiring dust free surfaces was impossible to comply with in the City of Philadelphia. The fumes, dirt and dust carried into the building by the air exchanges made an absolute dust free environment impossible. The Government warrants that its plans and specifications are free of defects and, therefore, a contractor is entitled to be compensated for the extra costs incurred in trying to comply with them. *U.S. v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); *Dept. of Natural Resources and Conservation of the State of Montana v. U.S.*, 1 Cl.Ct. 727 (Cl.Ct. 1983).

Even if it could be shown that the specifications were not defective, the implementation of the specifications were improper. The episode involving the snapping of a map thereby creating dust stands out as an example, as does the delay in conducting inspections and in reporting their results to Acmat. (903a) Limitations on government inspections generally fall into four categories: (1) unreasonable delay, (2) inadequate tests, (3) changing contract requirements and (4) interference with performance. See Briefing Papers, *The Inspection Clause*, The Government Contractor, No. 88-10, September 1988, (910a), *State v. Buckner Construction Co.*, 704 S.W.2d 837 (Tex. Ct. App. 1985), and *Adams v. U.S.*, 358 F.2d 986. (Cl. Ct. 1966).

The District Court wrongfully rejected the foregoing precedents. It is submitted that the breach of contract claims raise issues of fact that should have been allowed to go to trial. [31]

POINT III

**THE CONTRACT DOES NOT PRECLUDE ACMAT'S
CLAIM FOR DAMAGES DUE TO DELAY**

Another exculpatory provision misinterpreted and misapplied by the District Court is the one dealing with delays. See Article 15(c). (2246a) The District Court simply failed to understand that certain delays are compensable despite the language of the exculpatory provision.

Notwithstanding a "no damages for delay" clause, parties are generally permitted to recover delay costs in four situations: (1) when the delay was not of a kind contemplated by the parties; (2) when the length of the delay was unreasonable; (3) when there was evidence of bad faith; and (4) when the delay was caused by active interference.

The rationale for this is the implied obligation of the owner to refrain from interfering with a contractor's work, especially where it has sought to insulate itself from liability for delay with a "no damage for delay" clause.

In Pennsylvania this principle was recently addressed in *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A. 2d 862, 865, 866 (1986):

The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary in the prosecution of the work. *Gasparini Excavating Co. v.*

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Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A. 2d 157 (1963); ... "[W]here an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, [the owner] will be liable [32] for damages resulting therefrom." *Henry Shenk Company v. Erie County*, 319 Pa. 100, 178 A. 662 (1935).

See also, *Commonwealth of Pennsylvania v. General Asphalt Paving Co.*, 46 Pa. Commw. Ct. 114, 405 A. 2d 1138 (1979).

It is submitted that the record before the District Court was more than sufficient to permit the issue of delays to go to the jury. The School District in numerous instances, actively interfered with the work or failed to act in some essential manner.

Delays caused by unanticipated changes at the job site are certainly compensable. In addition, the School District's breaches, including unreasonable inspection requirements and delays in inspection all impacted on the progress of the job and constituted active interference. Other examples include the loss of elevator service and loss of efficiency because of the School District's failure to heat the building during the winter season. Indeed, the principle that prohibits an owner from interfering with a contractor's work is so strong that a clause absolving the owner from responsibility for delays due to its negligence will rarely be upheld. *Ozark Dam Constructors v. U.S.*, 127 F. Supp. 187, 190, 191, (Ct. Cl. 1955).

Surely, such acts as the School District's failure to heat the Rush School, to allow pipes to burst and flood the building constitute the types of conduct that are compensable.

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Accordingly, the School District cannot exculpate itself from liability for delays under the circumstances of this case. The question of compensation for delays should have gone to the jury. Moreover, the jury's responses to the Special Interrogatories regarding Acmat's entitlement to time extensions show that the [33] School District is liable for damages due to delay. Acmat is entitled to a trial on the damages flowing from these delays.

POINT IV**SUMMARY JUDGMENT DISMISSAL OF ACMAT'S
QUASI-CONTRACTUAL REMEDIES IS ERROR**

The District Court dismissed the quasi-contractual counts of Acmat's amended complaint in the erroneous belief that such claims could not be maintained without School Board approval. However, in making this decision, the Court ignored the many precedents that permit quasi-contractual recovery against municipalities on such grounds.

In *J. A. & W. A. Hess, Inc. v. Hazle Township*, 484 Pa. 628, 400 A. 2d 1277 (1979), the Supreme Court of Pennsylvania reaffirmed the well settled rule that recovery may be had against the Government on a quasi-contractual basis. Although certain exceptions were set forth in *Hess*, none of them are present in this action. See also, *Township of Ridley v. Pipe Maintenance Services, Inc.*, 83 Pa. Commw. Ct. 425, 477 A. 2d 610 (1984). Nor did the Court's decision in *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984) change this principle.

In *Derry Township School District v. Suburban Roofing Co., Inc.*, 102 Pa. Commw. Ct. 54, 517 A. 2d 255, 229 (1986), the Court held:

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The District misrepresents the Contractor's claim which is not for compensation for extra work performed under changes to the contract, rather, the Contractor is asserting a claim for its reasonable costs incurred in reliance upon the District's interpretation of the Contractor's performance under the terms of the contract, which interpretation the District [34] later altered to the Contractor's detriment. This is a proper case for equitable estoppel ...

We also distinguish this case from the circumstances in *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), upon which the District heavily relies. In *Nether Providence*, our Supreme Court held that public bodies cannot waive written authorization requirements in public contracts even if the waivers are in writing. There, the contractor sought to be compensated for extra work performed under a change order not approved by the school board as required under the terms of the contract. The Contractor here is not claiming increased costs due to extra work incurred by the District's oral changes to the contract, rather the Contractor is claiming compensation for costs which it reasonably incurred in reliance upon the District's interpretation of its performance under the contract.

Obviously, the District Court failed to distinguish among the causes of Acmat's claims and lumped them all together as "extra work" claims. As previously indicated, School Board approval was obtained to the extent necessary to prosecute Acmat's claims. The

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claims for quantum meruit asserted herein are all recognized under prevailing law.

The District Court also failed to understand that the count for "Equitable Adjustment" was not a claim for quasi-contractual recovery or breach of contract per se, but a claim under Article 14 of the contract. (117a) Accordingly, dismissal of the quantum meruit count was entirely improper. [35]

POINT V

**IT WAS ERROR FOR THE DISTRICT COURT TO
ACCEPT THE SCHOOL DISTRICT'S UNILATERAL
DETERMINATION OF THE VALUE OF
ACMAT'S CLAIMS**

In its order of December 21, 1988, the District Court acknowledged that the School District was liable for a category of claims that were directed by the School District as extra work, but which the School District failed to pass on to the School Board for approval. Acmat does not take exception to the finding of liability against the School District on those claims. However, the District Court's ruling that the School District's determination of the value of the claims was final and conclusive was clearly error. Indeed, it was not the School District that made this determination of costs, but its litigation expert, MDC Systems. (2364a-2366a)

The same reasons stated earlier for not allowing the School District to act as arbiter over Acmat's claims, also stand as reasons why Acmat should be allowed to proceed to the trier of fact on the issue of damages on those items allowed by the District Court.

POINT VI

**THE DISTRICT COURT COMMITTED
ERRORS AT TRIAL**

The errors committed by the Court during the pre-trial stages were further compounded at trial.

A. The award of delay damages to the school district must be reversed.

On the first day of trial, the School District was permitted to change its earlier election of liquidated delay damages [36] to actual delay damages. (1006a) To make matters worse, much of the evidence that would have exculpated Acmat from liability for the School District's purported delay damages was improperly excluded by the District Court.

The simple fact of the matter is that delays caused by the School District or which were neither the fault of Acmat or the School District may not be assessed against Acmat.

In *Commonwealth Department of Transportation v. W. P. Dickerson & Son, Inc.*, 42 Pa. Commw. Ct. 359, 400 A.2d 930, 933 (1979), the Court held:

Since Dickerson followed PennDOT's specifications in manufacturing the beams, the cracks and the resulting delays were wholly attributable to PennDOT. Where one party to a contract is the cause of another's failure to perform, it cannot assert that failure against the other. *Department of Property & Supplies v. Berger*, 11 Pa. Cmwlth. 332, 312 A. 2d 100 (1973). It is particularly well settled that a party may not retain liquidated damages for the amount of delay

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caused by its own actions. *Pittsburgh Iron & Steel Engineering Co. v. National Tube Works Co.*, 184 Pa. 251, 39 A. 76 (1898).

Acmat was clearly entitled to show, by a preponderance of the evidence, that the delays it experienced were excusable. *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444 (3rd Cir. 1983), cert. den'd, 464 U.S. 1038, 104 S. Ct. 698, 79 L. Ed. 2d 164 (1984). Moreover, in defense of the School District's delay claims, Acmat should have been able to use the entire record and history of each project, to show that delays were not its responsibility, but the fault of the School District or beyond its control.

In *Commonwealth Dept. of Transportation v. Cumberland Construction Co.*, 90 Pa. Commw. Ct. 273, 494 A. 2d 520, 524 (1985), the Court stated: [37]

We likewise reject PennDOT's contention that it was entitled to retain \$11,500 from the amount due Cumberland as liquidated delay damages. The record contains overwhelming evidence pertaining to the difficulties encountered by Cumberland as a result of the unusual subsurface conditions as well as the additional work ordered by PennDOT engineers. The unanticipated conditions as well as the additional work required Cumberland to reallocate machinery and equipment and delayed completion of the project.

Despite the foregoing precedents, the District Court erroneously limited Acmat's presentation to those items of work for which recovery was allowed in its order of December 21, 1988. (973a-975a)

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Moreover, the District Court improperly limited Acmat to time extensions that it found were expressly requested in writing. Further, the Court interpreted the writing requirement so narrowly, as to prevent the introduction of a whole series of letters. (1384a-1421a, 1820a-1827a, 2447a-2494a, 2512a-2543a) Neither the contract terms nor the prevailing law imposed such a requirement upon Acmat.

As noted previously, the majority of Acmat's claims for extra work were never considered by the jury on the time extension issue. It is submitted that even if the District Court were correct in denying Acmat compensation for additional work, it should have allowed evidence of the impact of that work on its ability to complete the work on schedule.

The issue of time extensions appears in two parts of the contracts. In Article 14(a) the pertinent provisions read as follows:

The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in [38] writing. If such changes cause an increase or decrease in the contractor's cost of, *or time required for*, performance of the contract, *an equitable adjustment shall be made* ... Emphasis supplied. (2244a)

Clearly, a time extension was mandatory under Article 14(a).

Article 15(c) set forth the following pertinent provisions:

If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond

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his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor ... the period hereinabove specified for completion of his work may be extended by such time as shall be fixed by the School District ... (2246a)

The District Court, consistent with its pre-trial approach, read the foregoing provisions as giving the School District the unfettered right to grant or deny time extensions. As previously indicated, the School District cannot be the final arbiter of its own contract and Acmat should be allowed to show entitlement to time extensions beyond that already proven.

Article 15(c) is really nothing more than a *force majeure* clause that permits time extensions for the reasons enumerated therein. The word "may" was not intended to limit Acmat's common law right to obtain time extensions for reasons that were beyond its control.

Notwithstanding the District Court's preclusion of evidence with respect to Acmat's proof of entitlement to time extension, and the District Court's erroneous charge to the jury regarding Acmat's burden of proof regarding time extensions, the jury found that Acmat was entitled to a complete extension of time [39] at the Rush School and extensions of time essentially through the dates of substantial completion at the Fairhill and Lincoln Schools. The jury further determined that the School District's failure to grant Acmat time extensions for the number of days found by the jury was arbitrary, capricious and an abuse of discretion by the School District.

A full extension might have been granted had the District Court not failed to instruct the jury that substantial completion of the

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contracts ends the period of delay. See *In re Stein*, 53 B.R. 81 (Bkrptcy. Ct., E.D. Pa. 1985), aff'd 57 B.R. 1016 (E.D. Pa. 1986). This was especially important with respect to the Lincoln School since there was beneficial occupancy of the building while Acmat was finishing its work. (1250a) Had the jury been properly charged, they would no doubt have denied the School District any damages for delay.

Accordingly, the award of delay damages to the School District was based on a limited presentation of evidence and should be reversed. On retrial, Acmat should be permitted to establish that it was entitled to extensions of time at the Fairhill and Lincoln Schools beyond those already determined by the jury.

B. Rulings, instructions, and the procedural conduct of the trial prevented a full and fair hearing of the retainage issue.

Initially, the District Court ruled that it would not hear the issue of contract retainages unless Acmat produced copies of the actual dump slips *delivered to the School District*. (984a-988a, 1000a - 1005a) The District Court even went so far as to state at one point that the issue was not pleaded. Only at the conclusion of the case, while offers of proof were being made by Acmat, did the [40] District Court reverse itself and allow Acmat to proceed on this issue. (1830a-1832a) However, the District Court continued to misconstrue the contract terms and the law as requiring proof that dump slips as defined by him were received by the School District. Indeed, the jury was not asked in the Special Interrogatories whether Acmat was entitled to contract retainages. The question posed was whether dump tickets were furnished. The District Court wrongfully interpreted the contracts as making the delivery of dump tickets an absolute condition precedent to payment of retainages and it so instructed the jury in its charge. (1928a) In spite of this court

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imposed requirement, Acmat did prove delivery of dump slips and there was no credible evidence offered to refute this fact.

Once again, however, the District Court overstepped its bounds. Initially, it is noted that the contracts contain an ambiguity that creates a jury question. Although the District Court relied on a provision in the work practices supplement to preclude payment, it is Acmat's contention that the terms of SC-13 entitled "Payment" govern the retainages issue and that "dump tickets" are not a requirement to payment. (2273a) This provision makes no mention of dump tickets. Accordingly, there was a jury question as to whether dump tickets were even an issue on the question of retainages.

Assuming, *arguendo*, that dump tickets were a requirement of the contract, the intent of the parties was to provide for proper asbestos removal and not receipt of a particular document. The fact of the matter is that the alleged failure to furnish dump tickets would be an immaterial breach. *Gray v. Weiss*, 519 A.2d 716 (1986) The School District could point to no damages it sustained due to the alleged failure to have dump slips. The threat of damages in [41] the future was pure speculation and the examination of James McKay on July 13, 1989, an employee of MDC Systems, was designed to inflame the jury with the fear of asbestos contamination. There was no proof or even a claim that the School District had been injured by not having the so called dump slips. Nor was there adequate proof that the School District didn't have the dump slips. Rather, the School District's counsel at the time, Eugene Brazil, testified that he authorized payment of the contract retainages to Acmat at the conclusion of Acmat's work. The entire issue was a red herring raised by the School District to frustrate payment of the undisputed sums. There was not even an allegation that the asbestos was

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improperly disposed of. Acmat was entitled to an instruction on immaterial breach, and properly excepted when the District Court refused to give one.

Since the issue was one of compliance with asbestos abatement and not the technical, ministerial requirement of producing a "dump slip", Acmat was entitled to be paid its contract retainages. The underlying intent and purpose of this requirement was fulfilled by Acmat. *Formigli Corp. v. Fox*, 348 F. Supp. 629 (E.D. Pa. 1972). Further, the cross examination of McKay was unfairly limited and obstructed by the District Court. (1958a-1863a)

Most outrageous and another reason for reversal and remand on the retainage issue is allowing counsel to read a cover letter from Acmat's prior attorneys as an admission, without any foundation. (1862a) This was extremely prejudicial and constitutes reversible error. [42]

C. The test of arbitrariness in the charge and special interrogatories was improper.

In its charge to the jury and in the Special Interrogatories the District Court erroneously stated that the School District's conduct was to be judged by an arbitrary standard. Indeed, the conduct of the School District was found to be arbitrary in numerous instances and no exception is taken to those findings. However, as to those items in which the School District was not found culpable, it is submitted that the proper standard is whether the School District acted reasonably. The arbitrary standard insisted upon by the District Court is only used in those cases in which discretionary acts are exercised within statutory authority. It does not apply to contractual relations.

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This case, of course, involves the School District's performance of a contract and it should be held to a reasonable man standard.

In *Tamaqua Borough v. Rush Township Sewer Authority*, 85 Pa. Cmmw. Ct. 421, 482 A. 2d. 1167, 1171, 1172, the Court held:

Assuming, *arguendo*, that the trial court properly exercised its jurisdiction, the Borough argues next that the trial court applied the wrong standard in reviewing the reasonableness of the rate here. The Borough maintains that the court was limited to determining whether or not it had committed a manifest and flagrant abuse of discretion in setting the rate at \$96.00 per EDU per year. Although we agree with the Borough's restatement of the scope of review in rate cases argued before a Court of Common Pleas, *Brandywine Homes v. Caln Township Municipal Authority*, 19 Pa. Commonwealth Ct. 193, 339 A.2d 145 (1975), we are not convinced that the trial court was faced squarely with an issue involving the reasonableness of an established rate. Here, the nature of the Borough's action to collect alleged arrearages under the contract dictated that the trial court would construe the contract and render a decision based upon its analysis of the agreement before it. Therefore, we do not [43] believe that this case represents a traditional rate review and, consequently, the court was not limited to determining whether or not the Borough had abused its discretion.

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Accordingly, the jury could have found that the contracts should have been extended for even greater number of days had it been allowed to judge the School District by a reasonable man standard.

D. The failure to instruct the jury that the School District was obligated to prove its damages with a reasonable degree of certainty was error.

It is well settled that the party seeking damages for breach of contract must show that its costs were fair and reasonable. Moreover, proof of such damages must be made with a reasonable degree of certainty. *Wilcox v. Regester*, 417 Pa. 475, 207 A. 2d 817 (1965); *Exton Drive-In, Inc. v. Home Indemnity Co.*, 436 Pa. 480, 261 A. 2d 319 (1970). The School District failed to satisfy its burden of proof and the District Court failed to instruct the jury on the rule of reasonable certainty for recovery of damages.

E. The failure to award pre-judgment interest to Acmat was contrary to law

In *Palmgreen v. Palmer's Garage, Inc.*, 383 Pa. 105, 117 A. 2d 721, 722, 723, (1955), the Court held:

Plaintiffs were entitled to interest at the rate of 6% per annum from the time when they should have been paid for the services rendered by them. In all cases of contract interest is allowable at the legal rate from the time payment is withheld after it has become the duty of the debtor to make such payment; allowance of such interest does not depend upon discretion but is a legal right ... It is a right which arises upon breach or discontinuance of the [44] contract provided the damages are then ascertainable by computation and

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even though a bona fide dispute exists as to the amount of the indebtedness ...

Even if there were an issue as to the amount of Acmat's damages prior to the Court's December 21, 1988 order, the amount became certain as of that date. Accordingly, Acmat is entitled interest on its damages from December 21, 1988.

POINT VII**THE JUDGMENT SHOULD HAVE REFLECTED AN
ADDITIONAL 15% MARKUP FOR ALL ITEMS**

In its order of September 7, 1989, the District Court failed to increase the amounts awarded for decadex encapsulant and electricity by the 15% mandated under the contracts in Article 14. (2394a The District Court illogically stated that the items do not constitute extra work and denied the markup for them. (2372a-235a). It is submitted that the items do constitute extra work. Should the Court otherwise affirm the lower court, it is requested that the amount awarded be increased by \$3,583.84, to account for the 15% that was arbitrarily refused for these two items.

POINT VIII**RULINGS AT TRIAL DEPRIVED ACMAT OF A FAIR
HEARING OF ITS DEFENSE**

The District Court throughout the trial of this action made rulings that severely prejudiced and hampered Acmat in the presentation of its defense. Time and again the District Court sustained groundless objections during the direct examination of Acmat's witnesses. The direct examination of Henry Nozko, Jr. on [45] July 10, 1989, is a case in point, as the District Court proceeded to cross examine Mr.

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Nozko during direct examination. So thorough was the District Court's examination that counsel for the School District declined to merely repeat the effort and waived cross-examination. (1595a)

The District Court even imposed a new test of admissibility, as it rejected evidence as not being "helpful". (1556a-1560a) It also allowed documents into evidence that made reference to insurance requirements in violation of Rule 411 of the Federal Rules of Evidence. (1106a-1108a)

Most egregious was the District Court's practice of allowing documents to be read to the jury by the School District over objection before ruling on their admissibility in evidence. This happened repeatedly on July 5, 1989, as exhibits were read to the jury over objection. Indeed, a portion of the Kaselaan & D'Angelo report was read to the jury and never received in evidence. (1123a-1124a) Moreover, most of the School District's exhibits, that were received in evidence, lacked the proper foundation and were offered through witnesses who had no personal knowledge of their contents. The District Court even refused to enforce Acmat's trial subpoena. (1541a-1544a)

The foregoing shows that Acmat was not permitted to present a full defense to the School District's counterclaims, which were supported for the most part, by incompetent and inadmissible evidence. [46]

POINT IX**THE CASE SHOULD BE REASSIGNED ON REMAND**

It is fundamental to our system of jurisprudence that litigants receive a full and fair adjudication of their disputes. A logical corollary to this principle is that one believe that he has received an

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impartial adjudication of his case. It is respectfully submitted that the record in this action shows a predisposition to the School District and a general hostility to Acmat.

While it is not suggested that the District Court intended to allow anything other than a fair presentation by both sides, the fact remains that a very one-sided presentation in favor of the School District was allowed at trial. In contrast, the District Court handcuffed Acmat in the presentation of its defense.

The District Court repeatedly demonstrated its belief in the merits of the School District's case, notwithstanding its attendant serious legal and factual deficiencies. The record further shows that the District Court implicitly and explicitly demonstrated its disagreement with Acmat's position. At one point, the District Court even referred to portions of Acmat's claim as being like a stagecoach holdup in the old West. (91a)

Another example that stands out is the episode in which counsel for Acmat clearly set forth the law allowing Acmat to receive time extensions. The District Court ridiculed counsel by calling his statement of the law silly. It is submitted that it would be virtually impossible for the District Court to enforce a law, even on remand, that it believed was silly. (973a-974a) [47] This is much more than a mere error concerning the law and its application to this case. Acmat cannot be expected to reasonably believe that the adjudication of its dispute is being handled fairly and impartially. This justified cause of concern must be addressed and redressed.

Additional examples described below are illustrative of the District Court's mindset in this case:

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At a pre-trial hearing on June 30, 1989, the District Court referred to Acmat as dilatory with regard to its documentation. (941a) Moreover, the District Court interrupted the opening arguments of Acmat's counsel even though nothing improper was being stated. (1040a-1045a)

The District Court unfairly aided the School District's attorney by making and sustaining the Court's own objections, though no objection had been raised by the School District. On July 13, 1989, after the presentation of the case on contract retainages, counsel for the School District said he had nothing further. (1377a) The District Court immediately called a sidebar and strongly urged counsel to get another witness to refute Acmat's presentation. (1877a-1878a) It is submitted that this type of assistance was improper and extremely prejudicial to Acmat.

The District Court wouldn't hear Acmat's motions at the close of the School District's case (1333a-1334a) and then later denied the motion for a directed verdict without hearing the numerous grounds on which it was based. Then realizing that it could not stop Acmat from making a record, the District Court told counsel to take only 15 seconds to state its grounds. (1695a)

The impression that one receives is that the District Court's inclination is so strong, that it is unable to fully [48] appreciate Acmat's position in this matter. It is this reason that causes Acmat to request that this action be reassigned on remand to either another district or another judge. This would avoid even the appearance of bias or hostility to one side or the other and insure, consistent with basic principles of jurisprudence, that both parties objectively know that each had its day in court.

*Appendix H***CONCLUSION**

Based upon the foregoing, it is respectfully requested that the judgment entered in this action be modified and vacated in part, and that the action be remanded to allow Acmat to establish liability and damages to those claims dismissed by the District Court on summary judgment and to prove further damages on those claims allowed by the District Court on summary judgment. Moreover, the case should be remanded to permit Acmat to show that it is [49] entitled to additional time extensions of the contract completion date over and above that already allowed by the jury.

Dated: January 15, 1990

Respectfully submitted,
GODDARD & BLUM
*Attorneys for Plaintiff-Appellant-
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By: Signature
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I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Dated: January 15, 1990

Signature
Edward A. Stein

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**APPENDIX I—REPLY BRIEF OF APPELLANT
AND BRIEF OF CROSS-APPELLEE SUBMITTED TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

In The

United States Court of Appeals

For The Third Circuit

Nos. 89-1930 & 89-1953

ACMAT CORPORATION,

Plaintiff-Appellant-Cross-Appellee

vs.

SCHOOL DISTRICT OF PHILADELPHIA,

Defendant-Appellee-Cross-Appellant

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania**

**REPLY BRIEF OF APPELLANT and
BRIEF OF CROSS-APPELLEE**

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PRELIMINARY STATEMENT

This brief is filed by Acmat Corporation ("Acmat") in reply to the brief served by the School District of Philadelphia ("School District") on the main appeal and is submitted as Acmat's principal brief on the cross-appeal.

ARGUMENT

POINT I

**ACMAT WAS IMPROPERLY DENIED ITS DAY IN
COURT BY THE ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO THE
SCHOOL DISTRICT**

The legal precedents and the issues of material fact present in this action make the District Court's dismissal of Acmat's claims in a summary judgment motion reversible error. Nevertheless, the School District continues to argue that Section 5-508 of the Pennsylvania Public School Code of 1949, 24 P.S. §5-508, and the terms of the contracts preclude recovery for additional work performed by Acmat at the asbestos abatement projects. On the contrary, the contractual provisions and the facts and circumstances giving rise to Acmat's claims mandate the payment of compensation. Moreover, the facts show that the statutory prerequisites to payment were fully satisfied. The precedents cited by the School District in support of its assertions are inapplicable to the case at bar. For example, none of the cases contain the type of equitable adjustment clauses under [1] consideration in this case. For these reasons, the suggestion that this is a routine "extra work" case must be rejected. The School District's brief obfuscates and distorts contractual language and actually raises more issues of fact

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than it settles. Other serious errors committed by the District Court were simply not addressed in the School District's brief.

A. The Provisions of the Pennsylvania Public School Code of 1949 Were Fully Satisfied.

It is incontrovertible that School Board approval was obtained for the three main agreements, the Supplemental Agreement and Change Order for the Rush School and the addition of the Work Practices Supplement at the Fairhill School.¹ (140a-142a)²

The crucial point overlooked by the District Court is that each of the contracts, as approved, provided a mechanism for adjustment of compensation on account of additional work. Consequently, initial approval of the contracts, with the [2] provisions of Article 14,³ satisfied the requirements of the School Code for all items of additional work arising thereunder. Indeed, Section 5-508 of the School Code refers to School Board approval only upon entering into contracts. It does not prohibit the School District from entering into contracts that permit adjustment without further School Board approval. The *Matevish*⁴ case cited in the School District's brief is

¹ The School District's initial brief on appeal also acknowledges School Board approval for these agreements and unilaterally directed work items at pages 12-14. Acmat acknowledges that it signed the change order for the Rush School, but submits that it reserved its right to seek additional compensation. The School Board approved the Work Practices Supplement at the Fairhill School, but Acmat denies that it agreed to \$18,000 as the additional amount due under the contract. No change order has been produced to show Acmat's agreement to that amount.

² Numbers in parentheses represent pages in the Appendix on Appeal. Numbers with the prefix SA refer to the Supplemental Appendix.

³ Citations to the construction correspond with sections in the Rush agreement which can be found at page 2197a of the appendix.

⁴ *Matevish v. Ramey Boro School District*, 167 Pa. Superior Ct. 313, 74 A.2d 797 (1950).

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inapplicable because the contract lacked the equitable adjustment provisions of the Acmat contracts. Accordingly, additional School Board approval is not required by the School Code under the circumstances of this case.

Indeed, the idea that the School Code requires School Board approval before payment of compensation on account of additional work was eschewed by the Supreme Court of Pennsylvania in those instances where a contractual framework had already been approved to deal with the issue.

In *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306, 309 (1964), the Court held:

The contract in the instant case was entered into under circumstances which fully complied with the above statute. The extra work which the plaintiff was required to do and upon which his claim is based was a natural extension of the quantum of the work contemplated by the original contract and was clearly covered by an express provision thereof. No work not [3] encompassed in the original contract was presented by discovery of the gasoline line, and thus no physical changes or alterations in the contract documents were necessitated thereby. The end product of the site preparation remained exactly as originally planned; only the manner of accomplishing it was affected. *The contract unequivocally provided for this contingency, and the plaintiff had a clear contractual right to adjust his method of operation and to recover his additional costs within the contract framework.* Emphasis supplied.

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Accordingly, the fact that additional work could arise was acknowledged and considered in Article 14 of the contract. The School Code does not impose the requirement of a second approval by the School Board under these circumstances. Nor for that matter does the School Code require School Board approval prior to commencing an action for common law breach of contract. Such a requirement would be ludicrous and would provide the School District with the type of immunity that the legislature has declined to enact into law. The District Court's holding to the contrary in its order granting partial summary judgment to the School District was clearly erroneous and must be reversed.

B. The Contractual Requirement of School Board Approval Was Fully Satisfied.

The School District's argument that Article 14 of the contract requires School Board approval for each and every item of additional work, no matter what its cause, distorts the parties' intent and seeks to impose its subjective interpretation upon this Court to Acmat's detriment. It is submitted that Acmat's interpretation and construction of Article 14 is the only one that [4] will give effect to the apparent purpose of the contract. If nothing else, the positions of the parties and the patently ambiguous language of the Article requires interpretation by the jury. The District Court's decision to interpret the ambiguous language of the agreement was reversible error. Moreover, the District Court's construction of the agreements was reversible error.

The fact of the matter is that Acmat satisfied all of the procedural prerequisites set forth in Article 14 for each of the claims that arose under its terms. The cause of each claim determines which of the paragraphs in Article 14 govern, a concept recognized in *Teodori v.*

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Penn Hills School District Authority, 413 Pa. 127, 196 A.2d 306 (1964).

Article 14(a) is a unilateral changes clause that allows the School District to order changes in work without Acmat's assent. Reference to School Board approval appears twice in the paragraph. In the first instance, School Board approval is mentioned for unilateral changes in work. The second reference to School Board approval is for changes in "contract price". The paragraph also states that an equitable adjustment for increases in cost *shall* be made.

Two of Acmat's claims arise under Article 14(a). They are Change Order No. 1 to the Rush School and the addition of the work practices supplement at the Fairhill School. The record clearly shows approval by the Board for these changes and Acmat was directed in writing to perform the work. (140a, 890a-892a, 896a) [5] Once directed to proceed, Article 14(a) clearly mandates that an equitable adjustment be made. Article 14(b) sets forth three ways of calculating the additional compensation to be paid Acmat. However, only a lump sum agreement to contract price requires School Board approval. Clearly, a second approval of unit prices was not intended since unit prices would have been sanctioned with the first approval. Nor was School Board approval applicable to the actual net cost calculation, which is the approach at issue herein. First of all, School Board approval is only made applicable to "contract price". It does not apply to all methods of calculating compensation set forth in Article 14(b). Significantly, the provision does not refer to School Board approval of the third alternative calculation of "actual cost" of labor and material. Simply put, it is not up to the School Board to approve or disapprove *actual* net cost, especially since that is a question for a jury in the event of a dispute.

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Otherwise, the School Board could rule on increases or decreases of costs without regard to what was actually incurred. The intent of the parties was to provide for an objective means of equitably compensating Acmat if the parties could not agree on a lump sum change in contract price. Indeed, it seems rather unlikely that School Board approval would ever be forthcoming if net cost plus 15% exceeded its offer of a lump sum change in contract price. The only reasonable interpretation is that the second reference to School Board approval in Article 14(a) was for those instances in which a lump sum change in contract price could be agreed upon. Any [6] other interpretation would leave Acmat at the School Board's mercy, even in those cases in which unit prices were applicable and already included in the contract or where the *actual* net cost of labor and material was the measure of compensation.

The parties could not agree to a lump sum change in contract price for the change order at the Rush School (891a) and Acmat expressly reserved its right to seek additional compensation under the net cost method set forth in Article 14(b). Article 14 simply does not require School Board approval when actual net cost is in issue. Article 14(b) by its express terms deals with increases or decreases in compensation. Only the lump sum calculation involves a change in contract price that would require School Board approval and, even then, only for those claims of additional work arising under Article 14(a). The second reference to Board approval in Article 14(a) does not permeate the entire provision and any such suggestion should be disregarded.

If nothing else, an ambiguity exists as to what the parties intended and that is a question for the jury. The cases cited by the School District are inapposite. Unlike the contracts reviewed in those cases, Article 14 of the Acmat agreements guaranteed compensation if

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costs increased on account of additional work approved by the School Board. Both approval and written authorization for work arising under Article 14(a) has been demonstrated.

Moreover, the final arbiter provision at the end of Article 14(b) is unenforceable as construed by the District Court. [7] Indeed, the School District offers no cases in support of its assertion that, in effect, would allow the School Board or School District to usurp the jurisdiction of the Court and deny Acmat its right of access to an impartial forum. Instead, it quotes only one sentence of a paragraph in *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A.2d 260 (1983), that clearly allows Acmat to seek recovery of damages despite a School District decision on the cost issue.

In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor. John F. Harkins, supra at page 265. Emphasis supplied.*

Accordingly, the District Court's interpretation of the final sentence of Article 14(b) was contrary to law. The *Harkins* decision is directly on point and held ~~that~~ the contractor could have its day in court despite the language of ~~the~~ contracts. The School District's determination was simply an initial step towards the final adjudication of the contractor's claim. Moreover, the provision attempting to make the School District the final arbiter of costs

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conflicts with the School District's assertion that the School Board has the final word. Once again, the ambiguity requires adjudication by the trier of fact.

Another category of claims arise under the differing site condition provision contained in Article 14(c). There is no [8] reference in Article 14(c) to School Board approval and the District Court's decision making the provisions of Article 14(a) applicable to claims arising under Article 14(c) must be rejected as having no basis in fact or law. Nor does Article 14(c) make written direction a prerequisite for obtaining recovery for differing site conditions. The distinction between claims and the contractual provisions governing their compensability was recognized in *Teodori v. Penn Hills School District Authority*, *supra*. Moreover, Article 14(d) permits verbal instruction, provided they do not depart from contract documents. The contracts clearly provided procedures for dealing with differing site conditions.

Further, the contracts permit the notice requirement of differing site conditions to be satisfied orally or in writing. The record, however, is replete with documentation concerning differing site conditions, including written direction to proceed with performance of work.

Acmat's exhibits in opposition to the motion for summary judgment are contained in two volumes beginning at page 156a of the appendix on appeal. Also on file at the time partial summary judgment was granted was Acmat's Statement of Claim which includes three volumes of exhibits. (348a) The index beginning at page 487a lists documents that show the School District had notice of differing site conditions. The additional work referenced in the documents obviously delayed Acmat. [9]

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The School District mischaracterizes the modification to drawings provision in Article 14(c). The clause provides for such changes only as the School District "may find necessary". Simply put, the discovery of differing site conditions does not always require changes in drawings and such changes are not a prerequisite to payment of claims made under Article 14(c).

Indeed, the Court in *Teodori*, supra, allowed recovery for differing site conditions without changes in drawings, even though the contract contained similar language to that under review herein. The asbestos overspray at the site, for example, did not require changes in drawings. A normal amount of overspray to the side of structural members is anticipated in asbestos abatement and the Acmat contracts included the removal of overspray within normal bounds. The differing site condition was the discovery of overspray beyond normal limits and in areas where no contractor conducting a reasonable pre-bid site inspection could expect to find it. This includes sprayed on asbestos fireproofing in light fixtures, on electrical wiring and inside duct work. The School District mischaracterizes the overspray claim as one "not encompassed by the original contract". While Acmat was obligated to remove the usual and customary amount of overspray, no reasonable contractor would expect to find overspray in the locations where it was discovered or the extent of overspray encountered at the project. Indeed, one test for establishing a differing site condition is whether the contractor met an unknown condition differing materially from that shown on drawings and [10] specifications and one that could not have been anticipated from a study of the drawings and specifications. *Farnsworth & Chambers Co., Inc. v. U.S.*, 346 F.2d 577, 580 (Cl.Cl. 1965).

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In this connection, it should be noted that the pre-bid inspection required by the contracts did not call for a comprehensive investigation of every square inch of the building. A reasonable inspection would have required only an examination of the areas indicated on the contract documents. For this reason, Acmat could not have anticipated finding asbestos overspray below the ceiling line or even looking for it in the areas where it was ultimately found. (906a) Much of the overspray was found in areas that would have required demolition of existing structures to uncover it. Although obligated to remove the customary amount of overspray, much of it constituted a differing site condition that is compensable under the agreements.

The School District's argument that the requirement of School Board approval of contract price in Article 14(a) applies to claims for differing site conditions under Article 14(c) is a perverse reading of the contract. It also runs contrary to the principles set forth in *Teodori v. Penn Hill School District Authority*, supra. Indeed, the reference to "increase or decrease of cost" in Article 14(c) is a clear reference to the third manner of adjusting compensation in Article 14(b). There is no reference to "contract price" that could even arguably make Article 14(a) applicable to the calculation of compensation paid under Article 14(c). [11]

In sum, Articles 14(a) and 14(c) function independently of each other. Article 14(a) deals with additional work caused by unilateral changes initiated by the School District and Article 14(c) governs additional work that results from differing site conditions.

*Appendix I***C. The Site Inspection Clauses of the Contracts do not Abrogate the Equitable Adjustment Provisions of Article 14.**

Having gained the financial advantage of obtaining a lower contract price because of the differing site condition clause, the School District now wishes to nullify the provision by claiming that a comprehensive investigation of the site would have uncovered all conditions.

If allowed to stand, the District Court's order will have shifted the risk of differing site conditions to Acmat. This is an obligation that it did not agree to accept and a contingency that it did not include in its bid.

Indeed, an interpretation that allows the site inspection clauses to abrogate the differing site condition provision is contrary to well settled principles of contract construction.

All the different parts of the agreement must be viewed as a whole, and each part interpreted in the light of all the other parts. An interpretation which gives meaning to every part will be preferred to one that gives no effect to one or more parts. If this is not reasonably possible, then it should be interpreted in such a way as to give effect to the apparent principal purpose of the contract.

So also all the different writings which relate to the same transaction must be interpreted [12] together. This would seem to be so, whether or not they form a single contract. *Murray on Contracts*, 2nd Rev. Ed. Section 115.

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In *Mayer v. Development Corp. of America*, 541 F. Supp. 828, 857, aff'd 688 F.2d 822 (3rd Cir. 1982), the following pertinent language appears:

...., it is a standard tenet of contract interpretation that the contract is to be considered as a whole and effect given, wherever possible, to all its parts. Capitol Bus Co. v. Blue Bird Coach Lines Inc., 478 F.2d 556 (3rd Cir. 1973). "An interpretation which gives effect and meaning to a term is to be preferred over one which makes such term mere surplusage or without effect." Rossville Salvage Corp. v. S. E. Graham Co., 319 F. 2d 391 (3rd Cir. 1963). Emphasis supplied.

In spite of the foregoing precedents, the District Court accepted the School District's assertion that the site inspection clauses shifted the risk of all unknown conditions to Acmat, and essentially voided the terms of Article 14(c). The site inspection clauses do not require an exhaustive investigation, but one in which the prospective bidder visually ascertains the physical characteristics and limitations of the site. It certainly does not contemplate demolition that could cause the uncontrolled release of asbestos fibers. Nor would a reasonable bidder be expected to look for sprayed on asbestos in areas so far away from the structural members, which was where the asbestos was to be applied during construction.

The cases cited by the School District and relied upon by the District Court involve contractual terms that were very [13] different from that under review herein. None of those contracts contained a differing site condition clause. Moreover, each of the contracts in those cases had the type of provision that made the contractor

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responsible for unknown conditions. Many even included a disclaimer with respect to the accuracy of the contract documents.

The provisions under review herein are markedly different from those adopted by the District Court and relied upon by the School District. In *Commonwealth v. Acchioni and Canusco, Inc.*, 14 Pa. Commw. Ct. 596, 324 A.2d 828 (1974), the contract did not contain a differing site condition clause, and also disclaimed any responsibility with respect to subsurface information given to the contractor. Moreover, the site investigation clause clearly made the contractor aware that it was responsible for learning about the subsurface. The contract in *Commonwealth v. Mitchell's Structural Steel Painting Co.*, 18 Pa. Commw. Ct. 591, 336 A.2d 913 (1975), contains similar language to that in *Acchioni*. Likewise, the contracts in *Montgomery v. City of Philadelphia*, 31 Pa. 607, 139 A.2d 347 (1958) and *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), did not contain a differing site condition clause. Further, the contracts in those cases placed full responsibility for knowing the conditions of the site on the contractor. Presumably, each of the contractors in the cases cited by the School District adjusted their bids to account for differing site conditions. Acmat, however, bid the project in the belief that its compensation would [14] be adjusted in the event that differing site conditions were encountered.

As a matter of fact, the School District failed to satisfy its burden of proof in the summary judgment motion with respect to this issue. It did not show that a reasonable site inspection would have uncovered the hidden conditions. Reliance on deposition testimony of individuals that were present during construction has no bearing on the question of the procedures in place at the time of the pre-bid inspection. The School District's statement at page 36 of its brief

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that Acmat failed to inspect the site is belied by the record. (153a, 880a, 897a, 906a) The Dalton affidavit clearly shows that the conditions encountered by Acmat could not have been discovered by any reasonable pre-bid inspection. Issues of fact require reversal of the District Court's order granting partial summary judgment to the School District.

D. The School District Failed to Distinguish The Pennsylvania Cases Permitting Recovery of Delay Damages.

The cases cited in Acmat's initial brief clearly show that Pennsylvania adheres to the prevailing view that delay damages are recoverable, despite the existence of a "no damage for delay" provision. See *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862 (1986) and *Commonwealth v. General Asphalt Paving Co.*, 46 Pa. Commw. Ct. 114, 405 A.2d 1138 (1979). The question is truly factual in nature and cannot be [15] resolved on summary judgment. Acmat has alleged and demonstrated that the School District interfered with its work and that it encountered unanticipated differing site conditions. Some examples are the failure to furnish heat, allowing pipes to break, ordering a work stoppage, overinspecting the work and conducting tardy inspections, as well as, the overspray issue. Indeed, the jury, based on a presentation of evidence improperly limited by the District Court, found that Acmat was entitled to a 44 day time extension at the Fairhill School (2344a), 38 days at Lincoln School (2348a) and 210 days at Rush School (2351a). Significantly, the School District was unable to cite one Pennsylvania case that would deny Acmat recovery of damages for delay under the circumstances of this case. Many of the out-of-state cases that were cited are quite old and have been explained in later cases.

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In *Ace Stone, Inc. v. Township of Wayne*, 47 N.J. 431, 221 A.2d 515 (1966), the New Jersey Supreme Court reversed the summary judgment order dismissing a complaint alleging damages for delay. After reviewing the precedents, the case was remanded for a factual determination. Moreover, the Court in *Mack v. New York*, 122 Misc. 86, 202 N.Y.S. 344, aff'd 211 A.D. 825, 206 N.Y.S. 931 (3rd Dept. 1924), acknowledged that active interference would permit damages for delay if proved by the plaintiff. In *Corinno Civetta Construction Corp. v. City of New York*, 67 N.Y. 2d 297, 502 N.Y.S. 2d 681 (1986), the New York Court of Appeals reiterated the principle that exceptions allow recovery of damages for delay despite an exculpatory provision. It is submitted that it was [16] reversible error for the District Court to summarily dismiss Acmat's claims for delay on the basis of the contractual provision. The record shows that Acmat's claims come within the exceptions to enforcement of the "no damage for delay" clause.

E. Acmat's Alternative Theory for Quantum Meruit Recovery of Damages Should Not Have Been Summarily Dismissed.

The District Court's order dismissing Acmat's alternative count for quantum meruit recovery was based on the absence of School Board approval. (117a) It is axiomatic that no claim for quantum meruit recovery will have School Board approval. It is the lack of formal prerequisites that give rise to quantum meruit recovery. Accordingly, the District Court's decision dismissing the quantum meruit count in the amended complaint on the grounds that there was no School Board approval is paradoxical and contrary to law. The issue is whether the factual basis of Acmat's fifty-eight or so claims can give rise to quantum meruit recovery, if not otherwise recoverable under a contractual theory. Of course, this requires a factual determination based on oral and documentary evidence.

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In *Derry Township School District v. Suburban Roofing Co., Inc.*, 102 Pa. Commw. Ct. 54, 517 A.2d 255, 229 (1986), the Court allowed quantum meruit recovery and wrote:

The District misrepresents the Contractor's claim which is not for compensation for extra work performed under changes to the contract, rather, the Contractor is asserting a claim for its reasonable costs incurred in reliance upon [17] the District's interpretation of the Contractor's performance under the terms of the contract, which interpretation the District later altered to the Contractor's detriment. This is a proper case for equitable estoppel. In *Department of Environmental Resources v. Dixon Contracting Co., Inc.*, 80 Pa. Commonwealth Ct. 438, 471 A.2d 934 (1984), we held that equitable estoppel can be applied to a governmental agency to preclude that agency from depriving a person of a reasonable expectation when such agency knew or should have known that such person would rely upon the representation of the agency. *Id.* at 443, 471 A.2d at 936-937; see also, *De Frank v. County of Greene*, 50 Pa. Commonwealth Ct. 30, 412 A.2d 663 (1980).

As was the case in *Derry*, supra, Acmat was severely damaged by the School District's interpretation of the contract and was compelled to do large amounts of additional work. If not otherwise recoverable under one of the other theories discussed previously, these claims should be redressed on a quasi-contractual basis. A claim that stands out as a prime example is the work in the faculty cafeteria at the Lincoln School. Acmat was ordered to perform asbestos abatement in the area and did all the work preparatory to

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the actual abatement. The School District then halted the work and refused to compensate Acmat for the additional work claiming it was within the scope of the original contract. (1482a, 1483a, 1728a, 1729a, 1767a, 1768a)

Another example was the order to clean instructional material that was later rescinded after causing much havoc and disruption. (1425a-1429a) [18]

The issue is factual in nature and not, as the District Court stated, whether the School Board ever approved the work. It was reversible error to summarily dismiss the quantum meruit count.

F. There is no Sovereign Immunity for Common Law Breach of Contract Claims Against the School District.

Acmat's claims for common law breach of contract are in large part based on the School District's conduct during the performance of the contract. Acmat was forced to reclean areas that were perfectly clean to begin with and was subject to tardy inspections, overinspections and late reporting of test results. In addition, there was a failure to heat the premises and the School District allowed elevator service to stop functioning. These are not "extra work" claims as defined by the School District, but are claims that arise out of the School District's failure to live up to its contractual obligations. These breaches did give rise, however, to the huge expenditure of labor and additional work. Significantly, the School District's brief does not address Acmat's recovery for breach of contract on this basis.

The other group of claims that arise under common law breach of contract are those in which there was disagreement over the scope of work required by the contracts. Reliance of the School District on *Dick Corp. v. State Public School Building Authority*, 27 Pa.

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Commw. Ct. 498, 365 A.2d 663 (1976) is misplaced. The work performed by the contractor in *Dick* was acknowledged by both parties as extra to the contract. In such cases, the Court [19] held that the contractor is entitled to stop work until the contractual formalities are satisfied. In this instance, the parties disagreed about whether the items were extra work and Acmat continued to work under protest so that the project could be completed. Indeed, Acmat really had no choice, as it was threatened with termination and liquidated damages if it stopped work.

Moreover, the Court in *Dick*, *supra*, was not authorizing the type of procedure endorsed by the District Court in this case (87a), in which the contractor would stop work and wait for the School District to commence an action against it. A series of disputed work claims could delay a project for years as the parties argued their cause in the courts. It is also submitted that placing the onus on the contractor with respect to disputed work is inappropriate. The School District should have halted work on the disputed work item if concerned with the additional expense it could incur. As indicated in *Dick*, *supra*, the contractor must act responsibly and prudently. The concept of protest work was developed for this reason. In this way a project could continue unimpeded with the adjudication of the parties' dispute left for a later date.

If the claims arising from School District breaches are not revived, the School District will have been effectively immunized from damages for breach of a construction contract. Even the legislature has refused to grant such protection to school districts. [20]

POINT II**THE DISTRICT COURT COMMITTED REVERSIBLE
ERROR IN DENYING ACMAT ITS
CONTRACT BALANCE**

The contract balances due Acmat are in the amount of \$65,714.14 at the Rush School, \$46,400 at the Fairhill School and \$38,795 at the Lincoln School, for the total sum of \$150,909.14. (1844a)

The claim for contract balance and the School District's failure to pay was set forth in the amended complaint. See paragraphs "13", "26", and "28". (14a, 41a) Even the District Court found that such a claim was pleaded. (1831a-1832a) See also Acmat's Statement of Claim (350a), the School District's response thereto (SA4) and the School District's proposed charges. (SA 207) Accordingly, the contract balance issue was part of the action from the beginning.

Unfortunately, the District Court made the physical delivery of dump tickets the sole question with respect to payment of contract balances. However, the payment provision of the contract does not make dump tickets a condition precedent to receipt of contract balances. (2223a) The provisions cited by the School District merely succeed in showing an ambiguity with respect to the dump ticket requirement. It was an issue that should have been presented to the jury for determination. Nor was the jury allowed to consider collateral evidence of the proper disposal of [21] asbestos. For example, the punch list at the Fairhill School deleted dump tickets as an open item. (2328a)

The District Court instructed the jury as follows:

Acmat has the burden of proof with respect to the retainage issue. It has the burden of showing that it

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complied with the dump ticket compliance provisions of the contract. There does not appear to be any dispute as to what a proper dump ticket is or should be or as to the importance of it. Acmat says it sent the dump tickets but it doesn't have copies and the School District says it never received copies and Acmat has not complied. So you've heard all that. (1928a)

The question put to the jury in Special Interrogatories was whether Acmat supplied dump tickets in accordance with the contract. (2357a)

Clearly the charge and the Special Interrogatories improperly made the dump slips the only acceptable evidence of disposal. As stated in Acmat's initial brief, the School District does not claim improper disposal or any damages sustained on account of improper disposal. Accordingly, the alleged failure to furnish dump tickets is at best an immaterial breach. Acmat attempted to argue the point early in the trial (1004a), but the District Court was inclined to think that it was a material issue. (1005a) At the conclusion of trial, the District Court reversed its position and permitted Acmat to present its contract balance case, but indicated quite clearly that the supply of dump tickets was its only concern. (1832a-1833a)

Acmat was precluded from offering evidence of immaterial breach. Moreover, Acmat was unfairly prejudiced by being made the [22] defendant at trial and then having to present its contract balance claim at the end of the case. The foregoing error requires reversal and remand.

POINT III

ACMAT'S MOTION FOR REARGUMENT

The School District seeks to preclude or curtail review of certain issues that it states were raised for the first time in Acmat's motion for reargument.⁵ That motion, however, was designed to correct manifest errors of law committed by the District Court and did not raise any new issues. (SA594) The District Court even concluded that nothing new had been raised on reargument and that all of the points had been raised previously. (955a-956a)

As noted, the contract balance question was properly pleaded and was addressed in numerous documents submitted to the Court during the pendency of the action.

The issue of protest work appeared in Acmat's brief filed in opposition to the summary judgment motion (SA569-SA571), and was the subject of oral argument on October 31, 1988. (86a-89a)

The enforcement of the final arbiter provision was also raised in the initial papers submitted in opposition to summary judgment (SA580), and the subject of oral argument on October 31, 1988. (92a-95a, 103a) [23]

It should also be noted that despite its earlier comments, the District Court considered the papers submitted on reargument and expressly denied the motion on the merits. (956a) Accordingly, there is no impediment to this Court's review of all the arguments set forth by Acmat in this appeal.

⁵ Motions for reargument are permitted under Rule 20 of the Local Rules for the U.S. District Court for the Eastern District of Pennsylvania.

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Actually, the argument made by the School District on the reargument motion lends support to the position that the District Court interfered with Acmat's presentation. Acmat raised the question of reargument at a conference on April 10, 1989. The District Court granted Acmat leave to make the motion and that ruling was noted by counsel in its memorandum of law. (SA594) Thereafter, in a telephone conference on June 26, 1989, the District Court reiterated its prior ruling granting leave to reargue. This prompted the School District's attorney to send a letter to the Court in which it confirmed this fact.

Since Your Honor decided to review and consider Acmat's Motion for Argument, the School District requests reconsideration of that portion of the Court's December 22 Order which addresses Acmat's entitlement to credits.... (922a)

One can only imagine counsel's reaction when the District Court stated at argument: that it would consider the application as leave to reargue. (727a) Counsel emphatically stated its position that permission was previously granted (954a-955a) and the District Court never contradicted those remarks. It is also interesting that in September 1989, some nine months after the December 1988 [24] order, the District Court granted the School District's post-trial motion for reconsideration. (2362a)

It is submitted that the School District's argument concerning new issues is calculated to divert attention from the main focus of the appeal. All of the issues raised herein were part of the record in the original partial summary judgment application and are preserved for plenary review by this Court. Moreover, the papers submitted

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on reargument should be fully considered without limitation by this Court.

POINT IV**THE DISTRICT COURT'S FINDING OF LIABILITY
AGAINST THE SCHOOL DISTRICT ON THE PARTIAL
SUMMARY JUDGMENT MOTION WAS PROPER**

The District Court found the School District liable for a portion of Acmat's claims in its order of December 21, 1988. Acmat takes no exception to the finding of liability with respect to the claims, but submits that the amount of damages is a matter for determination by the jury. Of course, this appeal also seeks reversal and remand as to those claims that were dismissed in the order granting partial summary judgment to the School District.

For its part, the School District seeks denial of all the claims asserted by Acmat on the grounds that they lacked School Board approval. This argument, however, overlooks the School District's admission that it acknowledged certain items of additional work, but that it had failed to pass them onto the [25] School Board. (98a-102a) This was obviously an obligation that the School District failed to fulfill. The error committed by the District Court was in accepting the School District's valuation of the items and in otherwise dismissing the remaining claims in their entirety.

*Appendix I***POINT V****THE EVIDENCE ADDUCED AT TRIAL SUPPORTED
THE TIME EXTENSIONS GIVEN TO ACMAT**

The record shows that the District Court unduly hampered Acmat in its presentation of evidence on the issue of time extensions.⁶ A full record and proper instructions and interrogatories would no doubt have given Acmat a full time extension at all three schools. However, the record as it currently stands sufficiently supports the extension of time given by the jury in answers to Special Interrogatories. (2344a)

As shown in Acmat's initial brief, Article 14(a) and Article 15(c) of the contracts mandate time extensions on account of additional work and because of unforeseen causes.

The problems experienced at the schools were clearly the responsibility of the School District. Mr. Nozko testified at [26] length about the massive amount of additional work at the Rush School and its impact on Acmat's schedule. (1424a)

All work stopped at one point while Acmat was ordered to clean instructional material. (1425a-1429a) The School District later rescinded its order, but not before major portions of the project were disrupted.

At another point Acmat was ordered to remove learning materials from the first floor and carry them down to the second floor. This also involved a massive amount of additional work. (1431a-1432a)

⁶ Acmat argued on page 36 of its initial brief for remand in order to prove that additional time extensions should have been awarded. The only additional work Acmat was permitted to present were those items for which recovery was allowed by the District Court on partial summary judgment.

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The first floor of the school was added with a supplemental agreement. The circumstances of its execution were explained in the initial brief on appeal and in the record at pages 880a-889a. Acmat reserved its right to seek additional compensation for differences between the two floors. As it turned out the first floor involved a massive amount of additional work caused by differing site conditions. (1435a-1436a)

Other items of additional work that delayed the project and on which the District Court permitted testimony are as follows:

Removal and reinstallation of bottom shelf in closets (1440a-1441a)

Additional work in gaining access to louver (1441a-1442a)

Removal of encapsulated asbestos (1443a-1446a)

Perimeter soffit removal and replacement (1446a-1447a)

Work above metal ceiling in Room 130 (1447a-1449a) [27]

Removal and replacement of drywall ceilings in locker rooms (1449a-1451a)

Removal and disposal of transite panels (1452a)

Labor working above plaster ceiling (1453a)

Work in elevator shafts (1453a-1455a)

Decontamination after encapsulation (1455a-1456a, 1610a-1612a)

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Removal and disposal of cafeteria items (1456a)

Removal of plaster wall in Room 133 (1457a-1458a)

Extra cost of decadex (1458a-1461a)

Two claims that caused significant losses of time were the overinspections and lack of heat. Acmat was ordered to reclean areas that were in pristine condition because of the subjective judgment of inexperienced inspectors at the site. Moreover, inspections were not performed on a timely basis. All this caused a massive delay to the project. The impact of these items were testified about at length by Acmat's witnesses. (1426a-1470a, 1563a, 1602a-1610a)

The other breach that caused a massive delay to the project was the failure to heat the building during winter operations. The School District turned off the building's heating system and continued to leave it off despite Acmat's many requests and the breaks in pipes and flooding caused by the frigid conditions. Mr. Nozko testified that the School District explained to him that there was no heat because there was no money for it in the budget. (1582a-1584a) Mr. McKenna, a School District employee, [28] acknowledged that there were pipe breaks due to the cold and that the School District did nothing to prevent it from happening. (1247a-1248a) The loss of efficiency due to the cold and flooding all caused a massive delay to the project. (1625a-1632a) To make matters worse, the roof even leaked. (1644a-1645a) Mr. Brazil, an attorney for the School District at the time, acknowledged that at one point the School District agreed to be responsible for floor tiles that were damaged due to the leaks. (1686a) Further, Mr. Brazil admitted that there was a substantial amount of additional work at the Lincoln School. (1151a-1152a) Mr. Nozko also testified about the additional work.

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(1482a-1483a) Evidence was also received concerning the work stoppage ordered by the School District. Work at Fairhill was substantially delayed by the failure to have the elevator working. (1484a)

As indicated in Acmat's initial brief, Article 14(a) and Article 15(c) of the contracts mandate time extensions on account of additional work and because of unanticipated causes. Neither provision requires a request for time extensions and even the District Court acknowledged at one point that Article 15(c) was silent on the point. (1418a) The same, of course, is true of Article 14(a). Moreover, Mr. Brazil testified that time extensions were not usually subject to School Board approval. (1170a) Nevertheless, evidence of requests for time extensions was received in evidence. Many more requests for time extensions were rejected by the District Court. (1172a-1176a) [29]

The redacted letter received in evidence as Defendant's exhibit "5" (2317a-2319a), is a request for a 210 day time extension at Rush from December 31, 1984. (1423a-1424a) Reference is made to Lincoln in Defendant's Exhibit 10. (2323a)

At Fairhill there were written requests that were received in evidence as Defendant's Exhibit "11". (2325a) Oral testimony was received with respect to other written requests. (1487a-1491a) In addition, the School District agreed to a time extension at Fairhill at a meeting on October 3, 1984, which was memorialized in a letter dated October 5, 1984. (2313a) Indeed, one year after Acmat left the Fairhill School, Mr. Brazil was directing payment to Acmat. (1151a, 2315a)

Accordingly, there was more than sufficient evidence to support the jury's answers to Special Interrogatories granting time

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extensions. It is submitted that the case should be remanded to permit proof of entitlement to additional time extensions, as well as, damages for the delay caused by the School District.

POINT VI**REVERSIBLE ERRORS COMMITTED AT TRIAL**

The School District elected not to address a great many of the serious issues raised by Acmat in its initial brief and no reply is necessary on those points. It should be noted, however, that Acmat timely objected to the charge, including the District Court's failure to give even the most elementary charge on the [30] quantum of proof necessary to recover damages. (1934a) The School District's suggestion in footnote No. 8 of its brief on appeal, that this is a trivial point must be rejected.

Another significant issue not addressed by the School District is the admission of documents that made reference to insurance. Moreover, the arbitrary standard to which the District Court found that the School District should be judged was a gross error requiring reversal and remand.

CONCLUSION

The record in this case shows that errors committed during the pendency of this action deprived Acmat of a proper adjudication of its claims. The great majority of its claims were summarily dismissed in the order of December 21, 1988. The balance of the claims were treated improperly. The School District, on the other hand, received a full hearing of its claims, but failed to persuade the jury of the merits of most of them. The extent to which the School District succeeded at trial was due to the errors committed by the District Court. Consequently, the relief sought in Acmat's appeal

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should be granted and the relief requested in the School District's cross-appeal denied.

Based upon the foregoing, it is respectfully requested that the judgment entered in this action be modified and vacated in part, and that the action be remanded to allow Acmat to establish liability and damages to those claims dismissed by the District Court on summary judgment and to prove further damages on [31] those claims allowed by the District Court on summary judgment. Moreover, the case should be remanded to permit Acmat to show that it is entitled to additional time extensions of the contract completion date over and above that already allowed by the jury and to prove entitlement to the contract balances.

Dated: March 16, 1990

Respectfully submitted,
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By: Signature

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I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Dated: March 16, 1990

Signature

Edward A. Stein [32]

**APPENDIX J—PLAINTIFF-APPELLANT-
CROSS-APPELLEE'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC SUBMITTED
TO THE UNITED STATES COURT OF APPEAL FOR
THE THIRD CIRCUIT**

In The

United States Court Of Appeals

FOR THE THIRD CIRCUIT

Nos. 89-1930 & 89-1953

ACMAT CORPORATION,

Plaintiff-Appellant-Cross-Appellee,

vs.

SCHOOL DISTRICT OF PHILADELPHIA,

Defendant-Appellee-Cross-Appellant.

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania**

**PLAINTIFF-APPELLANT-CROSS-APPELLEE'S
PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC**

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PRELIMINARY STATEMENT

Plaintiff-Appellant-Cross-Appellee, Acmat Corporation ("Acmat") respectfully requests rehearing of the decision of a panel of this Court affirming the District Court's order of summary judgment dismissing the majority of Acmat's claims for breach of a construction contract and in permitting the defendant-appellee-cross-appellant, School District of Philadelphia's ("School District") to make the final determination of the amount of damages to which Acmat was entitled. The appeal also concerns reversible errors made at trial. Further, petitioner requests that this case be reheard in banc.

Rehearing should be granted because the appendix on appeal clearly shows the existence of genuine issues of material fact precluding summary judgment and that the District Court improperly resolved disputed issues of fact in arriving at its decision. Moreover, the interpretation given Section 5-508 of the Pennsylvania Public School Code of 1949, 24 P.S. §5-508 and Article 14 of the contract¹ deprived Acmat of due process of law in contravention of the Fourteenth Amendment of the United States Constitution and the relevant provisions of the Pennsylvania Constitution, P.L.E. Constitutional Law §272. Further, the Court's decision in this diversity action contravenes principles of Pennsylvania law as enunciated in decisions such as *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964) (allowing damages for differing site conditions notwithstanding School Code Section 5-508), *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, [1] 460 A.2d 260

¹ Three separate contracts are in issue. For ease of reference, citations to the contracts correspond with sections in the Rush agreement that appears in the appendix at page 2197a.

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(1983) (allowing the contractor to prove actual additional damages despite contractual language making the School District the "final arbiter" of costs for additional work) and *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862 (1986) (allowing a contractor damages for delay to the project, despite exculpatory contract language purportedly precluding such relief), all in violation of the mandates set forth by the United States Supreme Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny. The panel's decision is also at odds with the Supreme Court's decision in *U.S. v. Spearin*, 248 U.S. 132, 137 (1918), which rejected the notion that a bare site inspection clause could exculpate the Government from responsibility for issuing proper contract documents.

This case should be reheard in banc because the panel decision deviates from well settled Pennsylvania precedent and the issues involved are of exceptional importance to the entire construction industry performing work for the Commonwealth of Pennsylvania and its political subdivisions. Fed. R. App. P. 35(a). If the District Court's decision is allowed to stand, contractors will be denied recovery for differing site conditions, despite the presence of contractual representations providing equitable adjustment therefor, as well as, for breaches of contract. It is of great importance that this precedent not be permitted to remain law in this Circuit. If it does, the construction industry doing business with the Commonwealth of Pennsylvania will be faced with the necessity of either not bidding Commonwealth projects or including huge contingencies in their bids to cover such unanticipated costs resulting in higher overall costs to the Commonwealth. This would represent a giant step backwards [2] in the evolution of construction

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contract law in the United States and the Commonwealth of Pennsylvania.

Significantly, the District Court's interpretation of Section 5-508 of the Pennsylvania School Code effectively cloaks the School District with immunity from suit for its breaches of contract and constitutes an improper judicial usurpation of legislative authority. Contrary to the District Court's ruling, Section 5-508 was not enacted for the purpose of precluding the award of just compensation to contractors who incur additional costs and damages as a result of differing site conditions, delays and breaches of contract by the School District.

PROCEDURAL BACKGROUND

A. Proceedings in the District Court

In 1984 Aemat and the School District entered into separate contracts for asbestos abatement in three school buildings in the City of Philadelphia. This action was brought to recover damages that were sustained on account of differing site conditions materially different from those reflected in the plans and specifications, breaches of contract by the School District, delays caused by the School District and additional compensation for work unilaterally ordered by the School District. The District Court (Giles, J.) by order dated December 21, 1988, granted partial summary judgment to the School District. *Aemat Corporation v. School District of Philadelphia*, No. 85-7067, Slip Op. (E.D.Pa. December 21, 1988).

The District Court, relying on *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), dismissed the majority of the breach of contract claims based upon the absence of School Board approval as defined

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[3] in Section 5-508 of the Pennsylvania School Code and also its interpretation of Article 14 of the contract.

The claims based on quantum meruit and equitable adjustment were also dismissed because of the absence of School Board approval.

The claims for differing site conditions were dismissed because of the District Court's interpretation that changes in the scope of work and price required School Board approval. Moreover, the District Court found as fact that Acmat was obligated to perform a reasonable site inspection prior to bidding the work and that Acmat's inspection was unreasonable.

Other claims asserted by Acmat were allowed by the District Court. However, the Court relying on certain contract language, restricted compensation for these claims to that amount unilaterally determined by the School District, and further held that "... the claims for time and material costs are not subject to judicial review." (120a)

The claims for delay damages were dismissed by the District Court based upon certain purported exculpatory contract language.

Accordingly, the District Court's order was based primarily on its misinterpretation of applicable Pennsylvania law and the erroneous construction of an agreement that was patently ambiguous and required interpretation by the jury. The District Court made factual determinations of disputed material issues of fact and held that Acmat's claims were subject to summary dismissal.

The District Court ignored the State Court precedents cited, *supra*, which would have allowed Acmat recovery of its [4] damages and a motion to reargue was filed by Acmat. This too was denied.

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The School District's counterclaim was tried to a jury and the case culminated in an amended Final Judgment dated October 24, 1989.

B. Proceedings Before This Court

Acmat filed a Notice of Appeal in October 1989 and the School District cross-appealed. The appeals were argued before Judges Sloviter, Nygaard and Aldisert on May 21, 1990. A Per Curiam Judgment Order affirming the judgment of the District Court was entered on May 23, 1990.

ARGUMENT**I. THE RECORD BEFORE THE DISTRICT COURT AND THE PANEL DEMONSTRATED THAT DISPUTED ISSUES OF MATERIAL FACT EXISTED AND REQUIRED DENIAL OF SUMMARY JUDGMENT IN FAVOR OF THE SCHOOL DISTRICT.**

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Vol. 2 Moore's Manual, Federal Prac. & Pro. §17.10. In evaluating a motion for summary judgment, any doubt over whether there is a genuine issue of material fact must be resolved in favor of the non-moving party. In determining whether a genuine factual issue exists, the judge's "function is not himself [sic] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The moving party retains the burden of first showing the absence of a genuine issue of material

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fact. *Celotex*, supra. If, in a plausible case, [5] the non-moving party produces sufficient evidence of disagreement, then the motion for summary judgment must be denied. *Matsushita*, supra, citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253. And, of course, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

In the instant case, a critical issue of fact decided by the District Court on summary judgment was that Acmat did not conduct a reasonable pre-bid site investigation. This was clear error on the part of the District Court since the question of whether Acmat performed a reasonable site investigation could only be determined by what a reasonable contractor should have done under the circumstances presented. Clearly, a question for the jury. Acmat's alleged failure to conduct a reasonable pre-bid site investigation was cited as an additional ground for denial of the claim asserted under the Differing Site Condition Clause of Article 14(c). The record before the District Court at the time summary judgment was granted showed that genuine issues of material fact existed. There were literally hundreds of pages of documents attached to the answer to the motion for summary judgment (156a-334a),² as well as, a detailed statement itemizing and substantiating 56 separate claims with several volumes of supporting exhibits. (346a-841a). An index of the work items and the related exhibits appears at pages 487a-491a of the appendix. These documents were not mentioned in the District Court's order. [6] The documents show that the School District was on notice of the differing site conditions and

² Numbers in parenthesis represent pages in the Appendix on Appeal. Numbers with the prefix SA refer to the Supplemental Appendix.

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ordered that the additional work be performed. The asbestos overspray condition encountered at the Rush School is one example. (641a-644a) Although the School District later maintained that the asbestos overspray was not a differing site condition, it agreed to pay for overspray in ceiling fixtures on a time and material basis in a memorandum dated November 6, 1984. (516a) See also, page 622a. In a contemporaneous letter dated December 27, 1984, Acmat wrote:

ACMAT maintains the position that overspray on this project far exceeds anything that could have been considered by any bidder on the project and consequently is extra to the contract and must be paid as a change order. (654a)

On reargument, the affidavits of Eugene Lord (897a) and Frederick F. Dalton (906a) further established that the overspray was a differing site condition when they stated that no reasonable pre-bid inspection would have revealed the extensive overspray ultimately discovered at the Rush School. Moreover, even the School District and its team of consultants were unaware of the overspray condition.

Thus, Acmat did show that it conducted a reasonable site inspection, but that it did not detect the differing site conditions. Moreover, the District Court incorrectly construed the site inspection clause as abrogating the clause mandating equitable compensation for differing site conditions. The panel's decision must be reheard, preferably *in banc*, because it deviates from well settled principles of construction law and will have a deleterious effect on the entire construction industry doing business with the School District in the Commonwealth of Pennsylvania. Differing site condition clauses are designed to reduce the Commonwealth's

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expenditures for construction since such conditions are seldom [7] encountered. The panel's decision will return matters to the time when the Commonwealth paid excessive sums for construction because the contractor absorbed the costs for all hidden conditions at the work site.

Other claims involving differing site conditions are as follows and were categorized at page SA613 in the Memorandum of Law in Support of Reargument.

Rush 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 20,
 23, 24, 25, 26, 28, and 29.

Lincoln 3

Fairhill 2, 3 and 10

Many of the differing site conditions claims involve differences between the first and second floors of the Rush School. The first floor was added by Supplemental Agreement and there was no time to conduct an inspection. The Nozko affidavit at page 880a and the contemporaneous writing at page 608a show this to be the case. Accordingly, there was more than sufficient evidence before the District Court to deny the motion for summary judgment. Indeed, in view of the overwhelming factual evidence presented by Acmat in opposition to the motion, it is apparent that the District Court's order is predominantly the result of the District Court's misapplication of Pennsylvania law.

*Appendix J***II. THE DISTRICT COURT MISCONSTRUED THE
CONTRACT AND WRONGFULLY INTERPRETED
AMBIGUOUS LANGUAGE THAT CREATED
A JURY QUESTION**

Many of the ambiguous provisions of the contract were factually resolved against Acmat by the District Court. For example, contrary to the District Court's finding, the site inspection clauses of paragraph 7 of the General Conditions (2242a) and in Article SC-07 of the Special Conditions (2271a) simply do not require the type of exhaustive inspection imposed by the District Court. Similarly, the District Court's construction of [8] Article 14(c), as requiring School Board approval is nowhere to be found in its express language. The District Court reached for language from an unrelated portion of Article 14(a) which governs School District directed extra work to justify its decision.

In affirming the summary judgment order, the panel did not follow the standard enunciated by this Court in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1091, 1011 (3rd Cir. 1980):

It is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a *reasonable* alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder. See Corbin, Contracts §542. (Emphasis in original)

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Moreover, the District Court's decision, as affirmed by the panel, improperly merged the language of the changes clause in Article 14(a) with the differing site condition clause of Article 14(c). It is squarely at odds with the Pennsylvania Supreme Court's decision in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306, 309 (1964), in which the following was stated:

Authority next argues that the contract between the parties provided no agreement to pay for extra work in the amount claimed by Teodori. This contention is based upon the "Changes and Alterations" section of the contract, which clearly provides that such "changes and alterations" be made by written order. This argument completely ignores the section of the contract dealing with "Conditions Differing From those Shown on Plans or Indicated In Specifications", set forth in, full above. The parties obviously contemplated the possibility of the exact type of contingency which arose, and provided for it in the contract.

We agree with the conclusion of the Court below, that Teodori's right to extra [9] compensation, if any, *is governed by the "differing conditions" clause, and not by the "changes and alterations" clause*, the extra compensation not being sought for "changes" and/or "alterations" as those terms were used in the contract. (Emphasis supplied).

Neither the District Court nor the panel addressed the *Teodori* decision. The differing site condition clause, as interpreted by the *Teodori* Court, has been at the heart of the Government's efforts to

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reduce construction costs. If this decision is allowed to stand, it will most certainly cause a sharp increase in the amounts bid on government construction work in the Commonwealth of Pennsylvania.

**III. MAKING THE SCHOOL DISTRICT'S
DETERMINATION OF NET COSTS FINAL AND NOT
SUBJECT TO JUDICIAL REVIEW VIOLATES THE
GUARANTEE OF DUE PROCESS AND IS CONTRARY
TO PENNSYLVANIA LAW AS SET FORTH IN JOHN F.
HARKINS CO., INC. V. SCHOOL DISTRICT
OF PHILADELPHIA³**

Article 14(b) of the contract sets forth alternative formulas for calculating adjustments to the contract price on account of unilaterally directed work and work made necessary by differing site conditions. It concludes with language making the School District the final arbiter as to what Acmat's costs were on any particular item of work.

The District Court literally construed the clause as written and deprived Acmat of any judicial review of the School District's inadequate and patently erroneous determination of Acmat's costs. This finding was clearly contrary to the guarantees of due process found in the Fourteenth Amendment of the United States Constitution and the relevant provisions of the Pennsylvania Constitution. See P.S. Const. Art. 1, §1; P.L.E. Constitutional Law §272. Acmat had no hearing of any kind, as the School District arbitrarily assigned amounts to Acmat's claims and simply denied [10] others. Consequently, the impossible situation where one party

³ 313 Pa. Super. Ct. 425, 460 A.2d 260

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to a contract adjudicated the merits of the other parties' claim was sanctioned by the panel.

In P.L.E. Constitutional Law §135, the following appears in pertinent part:

It is provided, in the Declaration of Rights contained in our Constitution, that "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

See also, P.L.E. Constitutional Law §181.

Indeed, the Pennsylvania Superior Court expressly rejected the idea that the subject contractual language would make the School District's determination final and binding in *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A.2d 260 (1983).

The Court held the following:

In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor. John F. Harkins, supra at page 265. Emphasis supplied.*

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The *Harkins* Court, consistent with principles of due process, construed the subject language as simply an intermediate step toward having a dispute resolved in Court. Regrettably, neither the District Court nor the panel addressed the *Harkins* case. Acmat never waived its constitutional right to seek redress of its claims in a court of law. [11]

**IV. SUMMARY JUDGMENT DISMISSAL OF ACMAT'S
DELAY CLAIM AS A MATTER OF LAW WAS CONTRARY
TO PENNSYLVANIA PRECEDENT AS SET FORTH IN
COATESVILLE CONTRACTORS & ENGINEERS,
INC. V. BOROUGH OF RIDLEY PARK⁴**

The District Court summarily dismissed Acmat's claim for delay damages in one sentence of its order in which it stated,

11. ACMAT's claim for delay damages is barred by the specific language of the written contracts." (121a)

There was no mention of the fact that the Pennsylvania courts have declined to literally enforce these exculpatory clauses.

In *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862, 865, 866 (1986), the Court held:

The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary in the prosecution of the work. *Gasparini Excavating Co. v.*

⁴ 506 A.2d 862.

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Pennsylvania Turnpike Commission, 409 Pa. 465, 187 A.2d 157 (1963); ... "[W]here an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, [the owner] will be liable for damages resulting therefrom." *Henry Shank Company v. Erie County*, 319 Pa. 100, 178 A. 662 (1935)

See also, *Commonwealth of Pennsylvania v. General Asphalt Paving Co.*, 46 Pa. Commw. Ct. 114, 405 A.2d 1138 (1979).

Clearly, a factual determination was required prior to a ruling by the Court. It is submitted that the record before the District Court was more than sufficient to permit the issue of delays to go to the jury. The School District, in numerous instances, actively interfered with the work or failed to act in some essential manner. [12]

Delays caused by unanticipated changes at the job site are certainly compensable. In addition, the School District's breaches, including unreasonable inspection requirements and delays in inspection all impacted on the progress of the job and constituted active interference. Other examples include the loss of elevator service and loss of efficiency because of the School District's failure to heat the building during the winter season.

Indeed, the principle that prohibits an owner from interfering with a contractor's work is so strong that a clause absolving the owner from responsibility for delays due to its negligence will rarely be upheld. *Ozark Dam Constructors v. U.S.*, 127 F. Supp. 187, 190, 191, (Cl. Ct. 1955).

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Surely, such acts as the School District's failure to heat the Rush School, to allow pipes to burst and flood the building constitute the types of conduct that are compensable.

Accordingly, the School District cannot exculpate itself from liability for delays under the circumstances of this case. The question of compensation for delays should have gone to the jury. The panel's affirmance of the District Court's order was contrary to Pennsylvania law.

**V. THE SCHOOL DISTRICT IS NOT IMMUNE FROM
DAMAGES FOR COMMON LAW BREACH OF
CONTRACT**

Acmat asserted, and the record before the District Court established, that the School District had breached the contracts in several respects. The School District unreasonably interfered with construction by failing to heat the premises, allowing the elevator to stop functioning, conducting improper inspections and re inspections, conducting late inspections and issuing defective plans and specifications. It is clear that an owner may not impede the progress of a contractor. Yet that is precisely what the School District did when it ordered the cleaning of closets and (13) rails at the Rush School after the area was fully cleaned. As a consequence, the entire floor became recontaminated and had to be recleaned at great additional expense and time. The failure to heat the building caused flooding and additional cleaning. School personnel contaminated restricted areas by entering them without taking appropriate precautions. Clearly, the School District impeded progress and interfered with the planned sequence of work at the project.

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These and other breaches committed by the School District clearly entitle Aemat to compensation. No provision of the contract is designed to deal with these circumstances and Aemat's only recourse is to the courts. However, the District Court's decision, as affirmed by the panel, closed this avenue to Aemat and left it once again at the mercy of the School District. If allowed to stand, the Circuit Court will have imbued the School District with the type of immunity that the legislature has refrained from enacting into law.

Construction contractors and others who contract with the Commonwealth of Pennsylvania and its political subdivisions must be able to rely on principles of *stare decisis* and the interpretation afforded contract language in their contractual and commercial dealings. Contractors such as Aemat need to know with reasonable certainty the legal effect of their actions before entering into contractual arrangements. The decision of the District Court retroactively altered the legal effect of contractual terms and totally frustrated the legitimate expectations of Aemat who in every respect relied on prevailing law in its dealings with the School District. [14]

CONCLUSION

For the foregoing reasons, it is respectfully requested that this panel rehear the appeal or that the Court rehear the appeal in banc.

Dated: June 5, 1990

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By: Signature

Ray Goddard

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Signature

Ray Goddard

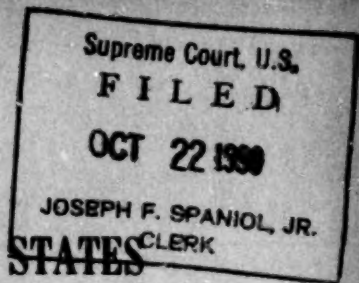
STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of Pennsylvania Courts, the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions, to-wit, the panel's decision is contrary to the decisions in *U.S. v. Spearin*, 248 U.S. 132 (1918), *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), *Celotex v. Catrett*, 477 U.S. 317 (1986), *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 613 F.2d 1001 (3rd Cir. 1980), *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964), *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A.2d 260 (1983) and *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862 (1986).

Moreover, this appeal involves a question of exceptional importance in that enforcement of the contract in the manner sanctioned by the panel will impact on all contractors doing business with the School District and will result in higher construction costs to the Commonwealth and its political subdivisions.

Signature (Ray Goddard)

②
Petition No. 90-499



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ACMAT CORPORATION,

Petitioner,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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COUNTER-STATEMENT OF THE CASE

A. Prior Proceedings

This is an action by Acmat Corporation ("Acmat") to recover damages for alleged extra work Acmat contends it performed in connection with three asbestos removal contracts with the School District of Philadelphia ("School District"). Acmat commenced this action by Summons and Complaint in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985. The Complaint set forth claims for breach of

contract, breach of warranty, *quantum meruit*, unjust enrichment, fraud, negligence, equitable adjustment, promissory estoppel and under the Racketeer Influenced Corrupt Organizations Act.¹

Following the completion of discovery, the School District filed a Motion for Summary Judgment on each of Acmat's claims on August 15, 1988. (R.A. 1).² The School District advanced the following positions in support of its motion: (1) Acmat was prohibited from recovering on any contractual or quasi-contractual claims for additional work because Acmat failed to obtain the approval of the School Board for the alleged extra work, as required under its contracts and under the provisions of the Pennsylvania Public School Code; (2) Acmat was precluded from recovering delay damages under the terms of its contract; (3) Acmat was barred from contesting the School Board's determination on labor and materials expended in the two instances where the School Board did approve additional work; and (4) Acmat was responsible under its contracts for ascertaining the full scope of its work and had a contractual obligation to perform the work it claimed it was unaware of when it submitted its bids.

Acmat conceded in its response to the motion that as a general rule it would not be able to obtain payment for alleged extra work in the absence of School Board approval. (R.A. 33). However, Acmat argued that an exception existed in those "instances dealing with situations where time is of the essence and the delay in waiting for School Board approval would be detrimental to the citizens of the Commonwealth." (R.A. 34). Acmat also contended it was entitled to pursue its claim since (1) equitable adjustment was "mandated" under the contracts; (2) the extra work arose from "unforeseen conditions"; and (3) a

1. Acmat's negligence and Racketeer Influenced and Corrupt Organizations Act ("RICO") claims were voluntarily dismissed with prejudice. Acmat's punitive damages and two fraud counts were withdrawn without prejudice. A single fraud count was later reinstated by Acmat.

2. "R.A." refers to the sequentially numbered pages of Respondent's Appendix attached hereto.

factual dispute existed which precluded enforcement of the "no damage for delay" clause. (R.A. 45, 39, 55).

The District Court issued a 22-page Order in response to the School District's motion on December 21, 1988. (App. C 5a-24a).³ The District Court found that Acmat's contract and quasi-contract claims were barred as a matter of law under the provisions of the Pennsylvania Public School Code due to the absence of School Board approval of the alleged extra work. Acmat's fraud claim was dismissed for failure to state a claim. The District Court also determined that a provision of the contract relating to an equitable adjustment was likewise subject to the provision in the contracts requiring Board approval of all changes in contract scope and price. In response to the unforeseen conditions argument of Acmat, the District Court ruled that Acmat did not comply with the procedures set forth in the contract requiring School Board approval of any change in the scope of work or contract price occasioned by the discovery of conditions not allegedly reasonably anticipated and that Acmat was bound by its contractual responsibility to ascertain the nature and location of the work. Acmat's claim for delay damages was rejected by the Court because it was barred by the specific language of the written contracts.⁴ (App. C at 5a-24a).

More than six months after the entry of the Court's Order of December 21, 1988, Acmat moved for reargument of the District Court's earlier order granting partial summary judgment to the School District. (R.A. 68). In addition to reiterating Acmat's prior position that there were unforeseen conditions

3. Appendices A through J are attached to Acmat's Petition and are numbered sequentially from 1a through 245a.

4. After making these rulings, the District Court, nevertheless, proceeded to determine on an item-by-item basis whether Acmat was entitled to receive damages for individual items of alleged extra work and the amount thereof. At the conclusion of the order, the District Court determined that Acmat was entitled to a total credit of \$203,723.79 against the School District's counterclaim. Due to adjustments, this amount was later reduced to \$132,420.70. The District Court's decision to award damages to Acmat, notwithstanding the lack of School Board approval, is the subject of the School District's Cross-Petition for a Writ of Certiorari.

and extra work orders by the School District, Acmat now asserted, for the first time, that it was entitled to pursue one category of claims, which was allegedly outside the scope of its contracts. Acmat argued this category of claims was not subject to the contract provisions. Also, Acmat challenged the District Court's entry of summary judgment on its claim for delay damages. Further, for the first time, Acmat challenged, as a matter of public policy, the provision in the contracts that made the School District the final arbiter of Acmat's net costs of labor and materials. (R.A. 86).

The School District filed a motion to strike Acmat's motion for reargument on the grounds it was untimely and did not include any facts or legal arguments which were unavailable to Acmat at the time it filed its original motion response. Following a hearing on Acmat's motion, the District Court denied Acmat's motion for reargument upon concluding that Acmat could have raised its new arguments in its response to the School District's original Motion for Summary Judgment. (App. D at 27a, 51a-52a).

The jury trial on the School District's counterclaim against Acmat took place from July 7 to July 14, 1989. In accordance with the jury's answers to special interrogatories, the District Court entered an Amended Final Judgment on October 14, 1989, in favor of the School District in the amount of \$23,480.92 on the School District's Counterclaim for delay damages and in the amount of \$16,975.42 on the School District's claims for contract-completion costs. (App. F at 97a). In the same Judgment, the District Court entered judgment in favor of the School District and against Acmat on Acmat's claim for payment of contract balances in the amount of \$150,909.14, and deducted the jury award in favor of the School District from the court's earlier summary judgment award to Acmat for a net award to Acmat of \$91,964.40. (*Id.*)

Acmat did not file any post-trial motion for a new trial or judgment notwithstanding the verdict. Post-trial motions filed by the School District were denied. Acmat filed an appeal to the United States Court of Appeals for the Third Circuit, and the School District, thereafter, filed a cross-appeal. The Court of

Appeals for the Third Circuit entered a Judgment Order on May 23, 1990, affirming the entry of final judgment by the District Court. (App. A at 1a). Acmat's petition for rehearing was denied by the Court of Appeals on June 22, 1990. (App. B at 3a).

B. Statement of Facts

In the spring of 1984, the School District entered into three separate written fixed-price contracts with Acmat for the removal of asbestos from three schools, the Fairhill Elementary School ("Fairhill"), the Lincoln Senior High School ("Lincoln") and the Rush Middle School ("Rush") in Philadelphia, Pennsylvania. The contracts were duly approved by the Board of Education of the School District of Philadelphia (the "School Board").

Acmat agreed in each of its contracts with the School District that Acmat would be solely responsible for "ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof." (App. E at 88a). Acmat further acknowledged that any failure on its part to ascertain the extent of its work under the contracts would not relieve it of "responsibility for successfully performing the work *without additional expense* to the School District." (*Id.*, emphasis added).

Also, Acmat agreed it would not be entitled to recover delay damages from the School District under any circumstances, including those instances where such delays were caused by acts or neglect of the School District. (App. E at 92a). Instead, Acmat agreed in each of its contracts that it could seek extensions of time to complete its contracts as a result of any delays on the job sites. (*Id.*).

Finally, each contract included a section setting forth the manner in which the contract documents could be modified. (App. E at 90a-91a). The contracts provided that the School District could make changes in the drawings or specifications, but mandated that any such modifications were subject to Board approval. These same procedures applied in those instances

where a contractor [Acmat] claimed it discovered site conditions differing from those shown in the contract drawings and specifications. (*Id.*).

The School District and Acmat agreed, with Board approval, to a single written change order for the work at the Fairhill School. The Board did not approve, nor did the School District ever issue, any change orders with respect to work at the Lincoln School. The parties agreed, with Board approval, to a single written change order at the Rush School. No other change orders or requests for additional compensation were approved by the School Board.

Acmat failed to complete its work at the three work sites within the time required under its contracts with the School District. The total fixed price for all three contracts was \$2,001,283. Acmat, however, subsequently sought nearly \$6,000,000 for alleged contract extras.

REASONS FOR DENYING THE PETITION

This case involves nothing more than a garden variety contract dispute between an asbestos-removal contractor and a property owner which is limited solely to issues of Pennsylvania law. As such, this case does not satisfy even remotely the standards which would support review on a Writ of Certiorari.

A review on a Writ of Certiorari is not a matter of right, but of judicial discretion. The rules of this Court provide that a Petition for a Writ of Certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 10. This Court has explained certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuits." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Rule 10 of the Supreme Court Rules sets forth certain situations in which the Court will consider exercising its discretion to review on a Writ of Certiorari. None of these standards even remotely applies here. This case does not involve a split

between the circuit courts on an important legal issue. More importantly, Acmat voluntarily dismissed its RICO claim and, therefore, has not pursued any claim under federal law against the School District. This case does not involve a situation where a United States court of appeals has decided a federal question in conflict with a state court of last resort or where a United States court of appeals has decided an important question of federal law which was not then, but should be, settled by this Court. Finally, this case does not involve a situation where a court of appeals has sanctioned an action by a District Court which has "departed from the accepted and usual course of judicial proceedings" contemplated by Rule 10, *supra*. As explained more fully below, there was more than an adequate legal and factual basis to support the actions of the District Court.

Acmat asks this Court merely to interpret provisions in asbestos-removal contracts and to interpret provisions of Pennsylvania law governing public school contracts in a fashion which has already been rejected by the District Court and the Court of Appeals. Acmat has failed to present any compelling basis for a review of these state law questions. Furthermore, many of the arguments Acmat has made to this Court and the Court of Appeals were never presented in a timely fashion to the District Court at the time it adjudicated the claims between the parties and are, therefore, beyond this Court's scope of review.

A. The District Court Did Not Deprive Acmat Of Its Procedural Due Process Rights.

In ruling on the School District's Motion for Summary Judgment, the District Court held that the great majority of Acmat's claims against the School District were barred as a matter of law because Acmat had failed to obtain approval in advance for this alleged extra work from the School Board, as required under the terms of its contracts and under the provisions of §5-508 of the Pennsylvania School Code.⁵ (App. C at 5a).

5. The Pennsylvania School Code of 1949 provides, in pertinent part, that:

The District Court, however, determined that Acmat was entitled to additional compensation with respect to a limited number of claims for additional work and determined the amount of additional compensation Acmat was entitled to based on the record before the Court. Acmat now complains that this aspect of the summary judgment Order was improper and that it should have been afforded a hearing to present further evidence concerning its alleged damages.

Significantly, Acmat did not contend at the time it responded to the School District's Motion for Summary Judgment that Paragraph 14(b) of the contracts between Acmat and the School District, making the School District the final arbiter of Acmat's cost of labor and materials, violated public policy or Acmat's due process rights. (R.A. 30). Acmat first raised this due process argument in an untimely motion for reargument of the District Court's order granting, in part, the School District's Motion for Summary Judgment. The District Court denied Acmat's motion for reargument because it concluded that Acmat had raised nothing which could not have been raised by Acmat when it filed its response to the Motion for Summary Judgment. (App. D at 51a-52a). The District Court's refusal to consider these new arguments on a motion for reconsideration was well founded. See *Hutchinson v. So. Central Bell Tel. Co.*, 815 F.2d 1058 (5th Cir. 1987) ("a party who presents his case on one theory and loses should not, in the absence of good reason, be permitted to have a second chance for the presentation of a new rationale"); *Keene Corp. v. International Fidelity Ins. Co.* 736 F.2d. 388, 393 (7th Cir. 1984) (a party cannot raise new legal theories in a motion for reconsideration or on appeal).

NOTES (Continued)

[t]he affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects: . . . [c]reating or increasing any indebtedness . . . [e]ntering into contracts of any kind . . . where the amount exceeds \$100.00 . . . [f]ailure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

Even if Acmat had challenged the "final arbiter provision" in its contracts in a timely fashion, any such challenge would be without merit. Acmat's reliance, for example, upon the case of *John F. Harkins Co. v. School Dist. of Phila.*, 313 Pa. Super. 425, 460 A.2d 260 (1983) is misplaced. Acmat cites *Harkins* for the proposition that it was entitled to offer proof of additional damages even where the School District was the final arbiter of the contractor's net cost. However, Acmat did not submit any proper evidence by affidavit in opposition to the School District's Motion for Summary Judgment to demonstrate its costs exceeded the amount approved by the Board.

Furthermore, Acmat's reading of *Harkins* is incorrect. *Harkins* involved the issue of whether a "total cost" method for evaluating additional work performed under a contract was appropriate. Reversing the trial court's use of the total cost method and its decision in favor of *Harkins*, the Pennsylvania Superior Court stated "[o]ur independent review of the record persuades us that this was error. In the first place, the School District was to be the final arbiter of the contractor's net costs." 313 Pa. Super. at 434, 460 A.2d at 265. Thus, the final arbiter clause was both enforceable and relied upon by the Superior Court in its decision. Further, the *Harkins* case involved only an evaluation of the "total cost" method. There is nothing in the record here to demonstrate that the School District argued that the final arbiter clause was binding and conclusive with respect to its determination of damage.

Finally, the District Court and the United States Court of Appeals for the Third Circuit are not bound by decisions of the Pennsylvania Superior Court in interpreting Pennsylvania law. *Goodwin v. Elkins & Co.*, 730 F.2d 99 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 118 (1984). The only decisions they are bound to follow in interpreting Pennsylvania law are the decisions of the Pennsylvania Supreme Court. *Id.* As explained more fully below, the Pennsylvania Supreme Court has refused to permit contractors to recover against school districts in those instances where base contract work or modifications have not been formally approved in advance by school boards.

In short, Acmat has not been denied any procedural due process rights under the terms of its contracts. Having freely agreed to the provisions in its contracts and having offered absolutely no proper evidence under Rule 56 of the Federal Rules of Civil Procedure at the time the School District filed its Motion for Summary Judgment, that the costs figures determined by the School District (and later approved by the court) were improper, Acmat has absolutely no basis to contend its procedural due process rights have been abridged.

B. The District Court Correctly Interpreted The Contract Documents.

Acmat next argues that the District Court incorrectly interpreted the "differing site conditions" provision in the asbestos-removal contracts between Acmat and the School District. Once again, Acmat is merely asking this Court to serve as the final arbiter of certain contract provisions which are to be interpreted under Pennsylvania law. This issue does not provide even remotely a "special and important" reason for this Court to review this case on a Writ of Certiorari.

Moreover, Acmat's argument is simply incorrect. Acmat's attempt to recover under the differing site conditions clause fails for three reasons. First, the final sentence of Paragraph 14(c) of the contracts provides that any increase or decrease of cost shall be adjusted in the manner provided in the contract for adjustment as to change. (App. E at 91a). This provision clearly relates back to the provision requiring School Board approval for contract modifications. Second, Acmat relies incorrectly upon the case of *Teodori v. Penn Hill School Dist. Auth.*, 413 Pa. 127, 196 A.2d 306 (1964), for the proposition that a differing site condition clause is not modified by a "changes and alterations" clause requiring formal approval of all contract changes. *Teodori* involved a dispute as to whether a "changes and alterations" section requiring a written order or differing provisions clause governed the dispute. *Id.* The case did not involve a provision present in the contracts between Acmat and the School District relating to Board approval of changes to the contract or contract

price. Further, the contract language in *Teodori* is materially different from the contract language in the present case. In *Teodori*, the parties followed the contractually mandated steps. Here, Acmat was required to provide proper notice to the School District of the alleged differing conditions pursuant to Paragraph 14(c). If that had been done, the School District was to investigate, and if it found *materially differing conditions*, it was to make changes in the drawings and/or specifications as it found necessary. Even if Acmat had gotten to the point where change in drawings and specifications was necessary, it required Board approval under Paragraph 14(a). Paragraph 14(a) expressly provides that the School District may, *subject to Board approval*, make changes in the drawings and/or specifications in the contract.

Furthermore, the court in *Teodori* specifically found that the differing conditions included work in the original contract, and no physical changes or alterations in the contract documents were necessary. 413 Pa. at 132-33, 196 A.2d at 309. By contrast, Acmat sought payment in this action for extra work that it contended was not within the provisions of its original contracts.

Third, Acmat cannot recover under the "differing conditions" clause is that it failed to conduct an inspection of the building site prior to submitting its bid to determine the full scope of the work at the project.⁶ Acmat expressly agreed in its contract that it was responsible for inspecting the site and acknowledged it would be responsible for all charges and costs resulting from its failure to verify the conditions at the site.

6. In moving for summary judgment, the School District presented extensive evidence concerning Acmat's failure to inspect the building site before it submitted its bids. The School District, for example, submitted deposition testimony from Acmat's own job foreman that the extent of overspray at the Rush School was readily apparent as soon as Acmat began moving the ceiling tiles on the first floor. The School District also submitted deposition testimony that Acmat typically performs an inspection before submitting its bids for asbestos removal contracts, and that these inspections include removal of ceiling tiles. In response, Acmat merely submitted an affidavit which was not based on personal knowledge and did not include any statement that Acmat was prevented by any action of the School District from making a proper inspection.

(App. E at 88a). Further, each contract provided that Acmat was responsible for ascertaining the nature and location of the working conditions which could affect the work, and that any failure to do so would not relieve Acmat from the "responsibility for successfully performing the work *without additional expense to the School District.*" (*Id.*, emphasis added). Under Pennsylvania law, once a public contractor assumes responsibility for being aware of the conditions it will encounter on the site, its duty cannot be excused simply because its visual inspection was inadequate. *Commw. v. Mitchell's Structural Steel Painting Co.*, 18 Pa. Commw. 591, 336 A.2d 913 (1975).

The Pennsylvania Supreme Court expressly rejected the argument Acmat now makes in *Nether Providence Twp. School Auth. v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In *Durkin*, a school authority entered into an agreement with a contractor to construct a new high school for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to clear additional ground at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work which had to be performed. Like Acmat, the contractor in *Durkin* was obligated to examine the site, ascertain the nature and location of the work and the general local conditions which would affect the work or cost thereof. *Id.*, at 46, 476 A.2d at 906. The contractor sought to recover for the extra work due to actual site conditions which differed from the contract documents and site plan provided by the School District. The Court denied the claim since the School Board had never approved the extra work.

The District Court here properly rejected Acmat's attempt to impose the cost of differing site conditions on the School District due to Acmat's failure to inspect the building site before it submitted its bids. The District Court stated that Acmat's failure to "ascertain what was entailed in performing the contracted work could not be visited upon the School District but

would be the contractor's responsibility for successfully performing . . . without additional expense to the School District." (App. C at 8a). The court concluded that:

[t]o permit a contractor to claim belatedly it could not discover the scope of the work through a pre-bid inspection, and without more, to collect for work not approved as an extra, would nullify the contract provisions controlling bidding and performance and undermine the fiscal authority and responsibility of the public contracting body.

(*Id.*). The District Court's reasoning is entirely consistent with the holding and spirit of the Pennsylvania Supreme Court in *Durkin*, which explained, "[w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds. . . ." 505 Pa. at 48-49, 476 A.2d at 907.

Acmat's reliance upon the decisions in *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918) and *United Contractors v. United States*, 368 F.2d 585 (Ct. Cl. 1966) is misplaced. Neither of these cases involves interpretations of Pennsylvania law and its strict requirements concerning Board approval in advance of all contract work or modifications.

C. The District Court Properly Entered Summary Judgment on Acmat's Breach of Contract Claims

The District Court properly granted the School District's summary judgment motion on Acmat's breach of contract claims. Relying upon the Pennsylvania Supreme Court's decision in *Durkin*, the District Court held that Acmat had failed to obtain the necessary approval from the School Board for its claims for alleged extra work, as required under the provisions of the Pennsylvania Public School Code and the provisions of its contracts with the School District. Well *after* the entry of summary judgment on behalf of the School District, Acmat argued for the first time that certain claims were beyond the scope of its contracts with the School District and were, therefore, entitled to adjudication under common law principles. (R.A. 88). Specifically, Acmat contended it had performed

"protest work", which was somehow separately compensable as a breach of contract, the requirement of Board approval notwithstanding. This issue was raised for the first time by Acmat in its untimely motion for reargument.⁷ As the School District has pointed out, Acmat was not permitted to raise these claims belatedly in an effort to set aside the entry of summary judgment. Further, Acmat is prohibited from recovering for "protest work" because it continued to perform its contract without obtaining School Board approval. *See Dick Corp. v. State Public School Bldg. Auth.*, 27 Pa. Commw. 498, 365 A.2d 663 (1976) (rather than proceeding with extra work without written authorization, contractor may refuse to perform it until it receives the contractually required written authorization).

D. The District Court Did Not Decide Improperly Disputed Issues of Material Fact.

Acmat takes issue with various legal and factual findings by the District Court at the time it ruled upon the School District's Motion for Summary Judgment. Acmat believes, for example, that the District Court should have characterized certain work as base contract work rather than extra work. Acmat also believes there were disputed issues of fact as to whether or not Acmat conducted a reasonable pre-bid site inspection.

Once again, these efforts to reargue the evidence do not even remotely qualify as "special and important reasons" to require the issuance of a Writ of Certiorari. Furthermore, Acmat is simply incorrect. Acmat does not point to even a *single* example of how the District Court improperly determined that certain work was base contract work, as opposed to "extra work." Acmat's second argument, that there were disputed issues of material fact as to the adequacy of Acmat's pre-bid inspection, is equally unfounded. As the School District has previously pointed out, Acmat failed to submit *any* proper evidence when the District Court decided the Motion for Summary Judgment

7. Local Rule 20(g) of the Rules of the United States District Court for the Eastern District of Pennsylvania requires that a motion for reargument or reconsideration be filed within ten days of the order or decree concerned.

to establish it conducted an adequate pre-bid inspection. It was not until many months *after* the Motion for Summary Judgment was decided that Acmat, in its motion for reargument, attempted to submit evidence for the first time concerning the adequacy of its pre-bid inspection. This evidence was properly disregarded by the District Court, since it could and should have been submitted by Acmat at the time it opposed the School District's original Motion for Summary Judgment.

In short, Acmat's arguments concerning disputed issues of material fact provide no compelling basis for a Writ of Certiorari and, furthermore, were never properly before the District Court.

E. The District Court Properly Dismissed Acmat's Claims for Delay Damages.

Acmat agreed in each of its contracts with the School District that it would not seek to recover damages if it were delayed in concluding its work under the three asbestos removal contracts.⁸ This clause prohibits Acmat from seeking damages from the School District even if it was delayed by acts of the employees or agents of the School District. This is merely one more instance where Acmat is asking this Court to interpret contractual issues under Pennsylvania law.

Contract provisions which prohibit damages for delay are "now universally accepted as valid." *F.D. Rich Co. v. Wilmington Housing Authority*, 392 F.2d 841, 843 (3d Cir. 1968). Acmat, however, now claims the School District caused delays by

8. Each of Acmat's agreements with the School District contains the following delay damages provision:

If any contractor shall be delayed in completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts of neglect . . . of any other contractor . . . the period herein-above specified for completion of his work may be extended by such time as shall be fixed by the School District, but *the contractor shall not be entitled to any damage or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.* (App. E at 92a, emphasis added).

interfering with the prosecution of its work. This is simply another instance where Acmat is now making a conclusory argument which was not properly supported by affidavit or other competent evidence at the time the District Court decided the School District's motion. Acmat presented no competent evidence to suggest, much less prove, that the School District had deliberately delayed Acmat in the prosecution of its work. Under the circumstances, the District Court properly entered judgment in favor of the School District on Acmat's claim for delay damages.

F. Based Upon The Jurors' Answers To Special Interrogatories, The District Court Properly Entered Judgment For The School District On Acmat's Claim For Contract Retainages.

The School District retained contract balances from Acmat because Acmat failed to provide copies of dump tickets evidencing the proper disposal of asbestos-contaminated materials. The contracts between Acmat and the School District provided in no less than three different sections that Acmat had to dispose of asbestos-contaminated materials removed from the schools in an approved landfill certified to receive hazardous waste, obtain signed dump tickets from the landfill and submit the dump tickets with its final payment requisition.

The School District produced overwhelming evidence at the counterclaim trial that the dump tickets had not been provided to it by Acmat. The jurors, by answers to special interrogatories, concluded that Acmat did not prove that it supplied to the School District all the asbestos site dump tickets in compliance with the contract specifications and conditions. The District Court, therefore, entered judgment against Acmat and in favor of the School District on Acmat's claim for the contract balances.

Acmat now contends that the District Court erred by not instructing the jury that the failure to provide dump tickets was an immaterial breach of the contracts. This argument is without merit for several reasons. First, it is self-evident that proof of

proper disposal of hazardous waste material is not an "immaterial" issue. The multiple requirements in the contract requiring dump tickets confirm as much. Second, Acmat never argued to the jury that the failure to provide dump tickets was an "immaterial breach" of the contracts. Third, Acmat never requested a point for charge instructing the jury that the failure to provide dump tickets was an immaterial breach.⁹ For all these reasons, the District Court properly entered judgment for the School District on Acmat's claim for contract retainages.

G. The District Court Properly Dismissed Acmat's *Quantum Meruit* Claims.

Acmat's argument that its self-styled, quasi-contractual claims did not require prior Board approval under the Pennsylvania School Code is simply incorrect as a matter of law. Quite obviously, if these claims were permitted to stand, the requirement that approval must be obtained in advance of the expenditure of public funds would be rendered meaningless. The Pennsylvania courts, therefore, have consistently rejected quasi-contractual claims when the requirements of a public statute have not been satisfied. *See Commw. v. Seagram's Distiller's Corp.*, 379 Pa. 411, 109 A.2d 184 (1954) (rejecting contractor's *quantum meruit* claim where contractor failed to comply with statutory requirements); *Appeal of Sykesville Boro.*, 91 Pa. Super. 335 (1927) (rejecting contractor's quasi-contractual claims against school district where required approval was not obtained).

The decision in *Derry Twp. School Dist. v. Suburban Roofing Co.*, 102 Pa. Commonw. 54, 517 A.2d 225 (1986) does not relieve Acmat of its obligation to obtain prior Board approval. Acmat seeks to recover for extra work, for which it never obtained Board approval. *Derry* did not involve a claim for extra work. The expansive reading of *Derry* advanced by Acmat would

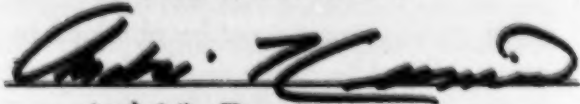
9. Not surprisingly, Acmat did not include its points for charge in either its appendix to its Appeal to the United States Court of Appeals for the Third Circuit or its appendix to its Petition for a Writ of Certiorari.

make *Derry* wholly inconsistent with the decision of the Pennsylvania Supreme Court in *Durkin*, *supra*, since many claims for extra work invariably involve a dispute between the contractor and the owner over each party's responsibilities under the contract. Under Acmat's approach, the contractor would merely have to show it disagreed with an owner's interpretation that certain work was required under a provision of the contract. Any such holding would abrogate the protections afforded by §5-508 of the School Code. The District Court properly concluded that *Derry* did not apply to the facts of this case.¹⁰

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Acmat Corporation's Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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Dated: October 22, 1990

10. In fact, the Commonwealth Court in *Derry* reaffirmed that *Durkin* prohibited a contractor from recovering compensation for extra work performed under a change order which was never approved by the School Board in accordance with contract requirements.

RESPONDENT'S APPENDIX

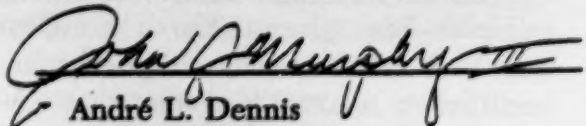
R.A.1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION : CIVIL ACTION
Plaintiff :
 :
v. :
 :
SCHOOL DISTRICT OF PHILADELPHIA :
Defendant : No. 85-7067

MOTION FOR SUMMARY JUDGMENT OF THE
SCHOOL DISTRICT OF PHILADELPHIA

The School District of Philadelphia hereby moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for the entry of judgment on its behalf with respect to each and every claim asserted by Acmat Corporation in its Amended Complaint. The School District of Philadelphia is entitled to the entry of judgment on its behalf because there is no genuine issue as to any material fact and because the School District is entitled to judgment as a matter of law under the provisions of the Pennsylvania Public School Code and under the provisions of its contracts with Acmat Corporation. The School District relies upon the memorandum of law which accompanies this motion as well as the attached Affidavit of Herman Mattleman, Esquire, President of the Board of Education of the School District of Philadelphia.



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Attorneys for Defendant
The School District of Philadelphia

MEMORANDUM OF LAW OF THE SCHOOL DISTRICT
OF PHILADELPHIA IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA:	:	
<i>Defendant</i>	:	NO. 85-7067

MEMORANDUM OF LAW OF THE SCHOOL DISTRICT
OF PHILADELPHIA IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Acmat Corporation ("Acmat") has filed claims against the School District of Philadelphia (the "School District") seeking additional compensation under three separate written agreements for the removal of asbestos at Fairhill Elementary School, Lincoln Senior High School and Rush Middle School in Philadelphia, Pennsylvania. The School District not only denies that Acmat is entitled to any additional compensation but insists it is entitled to substantial credits for work Acmat did not have to perform under the three agreements. In addition, the School District has asserted a counterclaim against Acmat and seeks in excess of \$400,000 due to Acmat's failure to complete the contracts within the time required in the agreements and to complete all labor and provide all materials called for in each of the agreements.

The School District now moves for summary judgment on its behalf pursuant to Rule 56 of the Federal Rules of Civil Procedure because there is no genuine issue as to any material fact and because the School District is entitled to judgment in its

favor as a matter of law under the terms of its contracts with Acmat and the provisions of the Pennsylvania Public School Code.

The terms of Acmat's three contracts with the School District are not in dispute.¹ The first of the three contracts is B-137 ("Fairhill Contract") under date of April 16, 1984 for the fixed price of \$446,000. (Exhibit No. 1) The School District, with School Board approval, and Acmat subsequently agreed on June 26, 1984 to a price change on the Fairhill Contract in the amount of \$18,000 and a change in specifications known as the "Work Practices Supplement". (Exhibit No. 2). The School District agreed to no other change in price on the Fairhill Contract. (Mattleman Aff. at ¶¶3-4).

The second contract is B-163 ("Lincoln Contract") under date of June 11, 1984, in the fixed amount of \$223,000. (Exhibit No. 3) The provisions in the Work Practices Supplement were a part of the specifications for the Lincoln Contract. No change order was issued by the School District with respect to this contract. *Id.*

The third contract is B-216 ("Rush Contract") under date of June 11, 1984, relating to the second floor of the Rush School in the fixed amount of \$595,000. (Exhibit No. 4) Provisions of the Work Practices Supplement were also part of the specifications for the Rush Contract. Under date of October 30, 1984, the School District and Acmat entered into a Supplemental Agreement B-43 to the Rush Contract. (Exhibit No. 5) The Supplemental Agreement, with School Board approval, added the first floor of the Rush School to Acmat's contract for an additional \$656,000. On April 29, 1985, the School District, with School Board approval, and Acmat agreed to Change Order No. 1 in the amount of \$63,282.89 for extra labor, material and equipment necessary to wet wipe items in closets and cabinets required because of the presence of asbestos. (Exhibit No. 6) No other

1. Copies of each contract, supplemental agreement and change order have been separately bound and submitted to this Court previously as Exhibits of the School District's Response to the Statement of Claim of Acmat Pursuant to Order of April 23, 1986. The exhibit numbers used in this memorandum conform to the exhibit numbers in that submission.

change order was issued by the School District with respect to this contract. (Mattleman Aff. at ¶___).

Acmat agreed in each of these contracts with the School District that it would be solely responsible for "ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof." (Fairhill Contract, General Conditions at ¶9(a); Lincoln Contract, General Conditions at ¶7(a); Rush Contract, General Conditions at ¶7(a)). Acmat further acknowledged that any failure on its part to ascertain the effect of its work under the contracts would not relieve it from "responsibility for successfully performing the work *without additional expense to the School District.*" *Id.* (Emphasis added).

Acmat further agreed it would not be entitled to recover delay damages from the School District under any circumstances, including those instances where such delays are caused by acts or neglect of the School District. (Fairhill Contract, General Conditions at ¶17(c); Lincoln Contract, General Conditions at ¶15(c); Rush Contract, General Conditions at ¶15(c)).

The asbestos removal contracts further provide that the School District may, *subject to the approval of the School Board*, make changes in the contracts. Each of the agreements, however, expressly cautions that verbal instructions given by any officer, agent or employee of the Board which depart from the contract documents shall not be binding upon the Board. (Fairhill Contract, General Conditions at ¶16; Lincoln Contract, General Conditions at ¶14; Rush Contract, General Conditions at ¶14).

The total fixed price for all three contracts was \$2,001,283.00. Acmat, however, now seeks somewhere between \$5 Million and \$6 Million in damages from the School District for alleged contract extras and modifications.²

2. Even at this late stage in the litigation, the precise amount of Acmat's claimed damages is unknown. Acmat has yet to provide either the School District or the Court with a final calculation of the damages it claims it incurred in connection with its work at the three schools. Acmat has attached to its pretrial memorandum a portion of a report by Kellogg Corporation which purports to set forth a "preliminary estimate of damages" incurred by Acmat on

R.A.5

The School District relies upon seven basic legal grounds in support of this motion:

(1) All of Acmat's claims for additional work must be rejected since Acmat failed to obtain the approval of the School Board for this alleged extra work as required under its contracts with the School District and under the provisions of the Pennsylvania Public School Code;

(2) Acmat's contracts with the School District and the case law provide that verbal requests by School District representatives shall not be binding upon the Board.

(3) Acmat is prohibited from recovering against the School District under any quasi-contractual theory of recovery since it has failed to comply with the provisions of the Pennsylvania School Code and its contracts with the School District;

(4) Acmat's fraud claim against the School District must be dismissed as a matter of law since Acmat is attempting to superimpose a tort theory on what is essentially a contractual cause of action and because Acmat has failed to establish that it reasonably relied upon any alleged misrepresentations by representatives of the School District;

(5) Acmat is precluded from seeking to recover delay damages against the School District under the terms of its contracts even in those instances where such delays may be attributable to acts or neglect on the part of the School District;

The School District of Philadelphia is a separate and independent School District administered, operated and managed by the Board of Education in accordance with state and local laws. The Pennsylvania Public School Code of 1949

the three projects in the amount of \$5,387,670. Following the submission of this motion, the School District will seek a conference with the Court or will file a motion seeking to compel Acmat to respond to the School District's discovery requests and provide it with a final accounting of the damages it claims it is entitled to under the three contracts.

R.A.6

provides, in pertinent part, that: "[t]he affirmative vote of a majority of all the members of the Board of School Directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects":

. . . Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds One Hundred Dollars (\$100.00) Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 Pa. Stat. Ann. §5-508. Each of Acmat's contracts with the School District provide that they are entered into subject to the provisions of the Pennsylvania School Code of 1949.

The plaintiff bears the burden of establishing both the validity of the underlying contract as well as approval of the contract by a majority of Board members. *Rudolph v. Albert Gallatin School District*, 60 Pa. Commw. 456, 431 A.2d 1171 (1981). Without a proper resolution, an action against the School District is precluded.

The Pennsylvania courts have insisted that contractors comply with the requirements of the School Code. In *Framlau, supra.*, the Court declined to enforce settlement terms agreed to by the president of the Philadelphia School Board and its attorney because the School Board declined to approve the Agreement as required under Section 5-508 of the School Code. Despite the apparent harshness of the result, the Court reasoned:

One who contracts with the School District must, at his own peril, know the extent of the power of the School District's officers in making the contract . . . [and] know that the Board of Directors may repudiate any contract provision to which it is assented. . . It is the general rule that where formal action is necessary to bind the School District, such a requirement must be met in order to predicate liability. In the absence of a compliance with the applicable statutory

provisions pertaining to the motive by which a board of school directors may make a contract, no enforceable contract will result.

Id. at 627-28.

Modifications to a school district contract likewise require approval by a majority of Board members. *Matevish v. Ramey Borough School District*, 167 Pa. Super. 313, 74 A.2d 797 (1950). In *Matevish*, the Court rejected a claim by a transportation company that the secretary of a School Board had orally modified the requirements of a contract for the busing of students. The Court concluded that modification of the contract required the approval of the School Board in compliance with the same Public School Code provisions which applied to the formation of the original contract. Absent compliance with the provisions of the School Code, the Court concluded that no liability could be imposed upon the School District for any alleged modifications to the contract.

2. Contract Requirements.

Acmat's contracts with the School District, like the School Code, provide that any modifications to the contract *must* be approved by the School Board:

[t]he School District may, . . . , *subject to approval of the Board* . . . make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in the contract price being *subject to the approval of the Board*.

General Condition ¶16(a) (emphasis added). Each contract also expressly cautions that "[v]erbal instruction given by any of the officers, agents, or employees of the Board which depart from the contract document shall not be binding upon the Board. General Condition ¶16(d). Thus, Acmat clearly agreed that: (1)

any modifications to the contract were required to be in writing; (2) any modifications were subject to the approval of the Board; (3) any change in the contract price was subject to the approval of the Board; and (4) verbal instructions which departed from the contract document were not binding upon the Board.

It is well recognized under Pennsylvania Law that strict compliance with the contractual provisions in a public service contract is necessary to support a claim under a contract for extra work or material. *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In *Nether Providence*, a School Authority entered into an agreement with a contractor to construct a new high school for the Authority for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to clear additional ground at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work which had to be performed. The School Authority's President authorized the School Authority's secretary to write to the contractor to acknowledge the dispute and recommend that the contractor continue the work with resolution of the disagreement at a later time. After the job was completed, the contractor submitted a claim to the School Authority for the extra work claiming that he had been induced to perform the work by the letter authorized by the School Authority's President. When the School Authority rejected the contractor's claim, the contractor brought an action against the School Authority seeking compensation for the extra work.

Recognizing the long line of Pennsylvania cases requiring strict adherence to the provisions of public contracts, the Pennsylvania Supreme Court rejected these claims for additional compensation. The Court noted that the contract obligated the contractor to determine the amount of cut and fill needed to complete the job and to inspect the work site in order to verify conditions and assess the work which was required to be performed. The contract also provided that "no change in the

contract shall be made without the written approval of the Board." The Court, therefore, declined to allow the contractor to recover since written approval of the Board was never obtained. In so concluding, the Court stated:

[w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long-established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body.

The Court in *Nether Providence* rejected the contractor's claim that the School Authority had waived the requirement that changes to the contract needed the approval of the Board. The Court held that a provision in a public contract relating to the manner in which changes to the contract can be made can be waived *only* by formal written action of the Board or by express ratification of the extra work by resolution of the Board. The Court, therefore, held that a letter prepared by the School District's president and secretary was not the act of the full board and that the formal written action requirement for waiver was not satisfied. The Court also observed that the Board had never adopted a resolution ratifying the extra work.

The Supreme Court's decision in *Nether Providence* is consistent with a long line of Pennsylvania cases which require strict compliance with contractual provisions regarding extra work in public contracts. In *Morgan v. Johnstown*, 306 Pa. 456, 160 A.696 (1931), written orders for the city engineer for alleged extra work were required by the terms of the contract. The Court held that, in the absence of a written order from the city engineer, the contractor could not recover for alleged extra work. Similarly, in *Montgomery v. Philadelphia*, 391 Pa. 607, 139 A.2d 347 (1958) the contract required the contractor to obtain a written order from the city engineer before proceeding with extra work. The Court refused to allow any recovery for additional work absent the required approval and explained that

authorization by a subordinate of the designated official would not constitute a waiver of the requirement of specific written authorization. *Dick Corp. v. State Public School Building Authority*, 27 Pa. Commw. 498 (1976) (rather than proceeding with extra work without written authorization, a contractor may refuse to perform until it receives the contractually required written authorization); *Commonwealth Department of Transportation v. Burrell Construction Supply Co.*, 483 A.2d 589 (Pa. Commw. 1984) (contractor could not recover for extra work in the absence of contractually required written authorization); *Commonwealth Department of Transportation v. Anjo Construction Co.*, 87 Pa. Commw. 310, 487 A.2d 455 (1985) (written orders for extra work required by the terms of municipal contract are a necessary predicate to recovery for extra work).

Nether Providence and its progeny require the entry of summary judgment on behalf of the School District. The contracts between Acmat and the School District provide in no uncertain terms that changes to the contract must be made in writing and approved by the Board. Any changes to the contract price were also subject to the approval of the Board. Other than the two occasions when the Board approved certain additional work, Acmat cannot point to a single instance where the School Board approved the changes to the contracts for which Acmat now seeks to recover.⁴ Having agreed to these provisions, Acmat has no basis to pursue its claims for additional compensation.

B. Oral or Written Directives of School District Representatives Do Not Constitute School Board Approval.

Having failed to obtain formal Board approval, Acmat nonetheless suggests it is entitled to recover against the School District because, it contends, various representatives of the School District directed it, orally or in writing, to perform alleged extra work. There are three fundamental problems with

4. Nor can Acmat point to a single instance where the School Board, by formal resolution, waived adherence to the provision in its contracts requiring formal Board approval.

this argument which have already been discussed at some length above: (1) The School Code requires formal Board approval of any contracts or modifications to contracts; (2) Acmat's contracts with the School District provide that all modifications to the contract must be approved by the School Board; and (3) Acmat's contracts further provide that any verbal instructions by representatives of the School District shall not be binding upon the Board.

The Pennsylvania Courts have consistently rejected efforts by contractors to circumvent the statutory or contractual requirements on the basis of alleged oral or written directives. In *Morgan v. Johnstown*, 306 Pa. 456, 160 A.696 (1931), the Court held a contractor could not recover for extra work on the basis that members of City Council had orally directed extra work be done when the contract required a written order of the city engineer. Similarly, in *Montgomery v. Philadelphia*, 391 Pa. 591, 139 A.2d 347 (1958), the Court held that when written orders of the city engineer for extra work were required, the contractor could not recover on the basis of authorization by subordinates of the city engineer. Authorization for extra work must be made in strict compliance with the contract provisions or the contractor is barred from pursuing claims for additional work.

Individuals who contract with public bodies governed by public statutes make agreements outside the parameters of the statute at their own risk. *Commonwealth v. Seagram Distillers Corp.*, 379 Pa. 411, 109 A.2d 184 (1954). The Court in *Seagram* refused to enforce an oral agreement between *Seagram* and the Board. The Board was required by statute to approve any such contracts. The Court stated that it was the obligation of *Seagram* to determine the extent of the authority of the Director of Operations to bind the Board by an oral agreement since "[p]ersons contracting with a governmental agency must, at their peril, know the extent of the power of its officers making the contract." *Id.* at 417, 109 A.2d at 186. The Court held that *Seagram's* oral agreement with the Board's subordinates did not constitute formal action by the Board and was, therefore, invalid. See also *Vona v. Redevelopment Authority of Delaware*

County, 109 Pa. Commw. 156, 530 A.2d 1018 (1987) (Plaintiff acted at his peril when he performed additional work on the basis of representations made by the Authority's counsel because counsel lacked proper authorization to enter into the agreement).

C. Aemat Is Prohibited From Recovering Against The School District Under Any Quasi-Contractual Theory Of Recovery.

In addition to its contract claims, Aemat has asserted various quasi-contractual theories in its Amended Complaint. Count VI sets forth a theory based upon *quantum meruit*, Count VII sets forth a claim for unjust enrichment and Count XI sets forth a claim based upon promissory estoppel.

By asserting these equitable claims, Aemat seeks to render the requirement of Board approval in the School Code meaningless and circumvent the requirements of its asbestos removal contracts. The Pennsylvania courts have consistently rejected quasi-contractual claims when the requirements of a public statute have not been satisfied. In *Commonwealth v. Seagrams Distillers Corp.*, *supra.*, the Court refused to permit *Seagrams* to recover on a theory of *quantum meruit* or quasi-contract because the Board had accepted all the benefits of the oral contract. The Pennsylvania Supreme Court held that since official action of the Board was required by statute, in the absence of compliance with the statutory provisions, there could be no quasi-contractual recovery. The Court further held that "the doctrine of quasi-contract does not extend to benefits which by their very nature cannot be surrendered, and the retention of which is therefore involuntary." *Id.* at 419, 109 A.2d at 187. The Court observed that where benefits conferred upon a public body pursuant to an invalid contract, by their very nature, cannot be surrendered, no implied obligation arises on the part of the municipality to make compensatory payment. As a result, *Seagrams* could not recover under any quasi-contractual theory of recovery.

These principles are equally applicable to public school districts. In *In re Appeal of Sykesville Borough*, 91 Pa. Super. 335 (1927), recovery on the theory of *quantum meruit* against the School District for improvements to a school building was denied. The statutory prerequisite of a majority vote of the Board was absent and the court concluded that the School Board was incapable of making agreements to pay on the rule of *quantum meruit* since all decisions regarding contracts must be made in accordance with the statutory mandate. Although the results of this rule may be harsh, to conclude otherwise, would produce the untenable result that school districts could become liable without all of the protections provided by the Public School Code. See also *Price v. Taylor Borough School District*, 157 Pa. Super. 188, 42 A.2d 99 (1945) (In the absence of compliance with the statutory requirements, a party contracting with the School District can have no recovery even on a theory of *quantum meruit*, for the statute excludes all equities and implied liabilities); *Newhard v. North Union Township School District*, 170 Pa. Super. 477, 87 A.2d 98 (1952) (Unless statutory provisions are observed there could be no enforceable contract entered into by a school board nor can a plaintiff recover on the basis of *quantum meruit*).

Furthermore, a party may not recover on a quasi-contractual theory against municipal authorities if that party fails to comply with contractual provisions governing modifications to the contract or extra work. In *Montgomery v. Philadelphia*, the Court explained the rationale for this rule as follows:

Where a contractor has attempted to recover for either additional work or work necessitated by a change in the plans and specifications, all of the cases in this jurisdiction have denied recovery where the contract prescribed a procedure for the prior approval of such additional work, and such prescribed procedure has not been followed. The reasons for the requirement of strict adherence to the contractual provisions are obvious. Municipal construction contracts, whose terms are in a large part governed by statute, are designed to provide, from the initial bidding to

final completion, for as many reasonably foreseeable contingencies as practicable, to forestall any possible collusion between city officials and contractors and to protect public funds against wanton dissipation.

391 Pa. at 616, 139 A.2d at 350. The court in *Montgomery*, accordingly, denied any recovery, contractual or otherwise by the part of the contractor.

Acmat's *quantum meruit* theory is clearly barred because Acmat failed to proceed in accordance with the requirements of the School Code on its contracts with the School District. Likewise, Acmat's claim for unjust enrichment is barred since it would void the statutory and contractual requirement of Board approval and would permit "contractual" relationships outside of the statutory protection provided by the Public School Code. Acmat's claim for unjust enrichment is also barred since any "benefit" conferred on the School District, by its very nature, cannot be surrendered, is not voluntarily retained and does not give rise to an implied obligation on the part of the School District to make compensatory payment.

Finally, Acmat's claim for Promissory Estoppel is based upon allegations that the School District promised to compensate Acmat for services rendered and materials supplied. As emphasized repeatedly above, modifications to the contract *must* be approved by the School Board under the terms of the contract and pursuant to the Pennsylvania Public School Code. Acmat agreed that its contracts with the School District would be subject to the provisions of the School Code and further agreed that any verbal directions by representatives of the School District would not be binding upon the Board. The School Board never approved the alleged modifications to the contract and this provision was never waived by the Board. Therefore, the School District is entitled, as a matter of law, to summary judgment in its favor on these claims.

D. Acmat May Not Recover Against the School District on a Theory of Equitable Estoppel.

The provisions of the School Code and its contracts notwithstanding, Acmat suggests it may recover against the School District in the absence of School Board approval under a theory of equitable estoppel. Acmat directs the Court's attention to the case of *Derry Township School District v. Suburban Roofing Co., Inc.*, 102 Pa. Commw. 54, 517 A.2d 225 (1986). Acmat's reliance upon *Derry* is misplaced. If anything, *Derry* merely re-affirms the commitment to the principle that a contractor cannot recover for alleged extra work absent compliance with the School Code and contractual requirements.

The School District in *Derry* awarded a contract to defendant to replace the roof on the School District's high school. The contract required the contractor to replace concrete planks on a unit price basis. The School District's inspector was to make the determination as to which planks had to be replaced. Initially, the School District's inspector determined that approximately 400 planks needed to be replaced and the contractor ordered sufficient replacement planks. However, a new school district inspector subsequently determined that a number of the planks did not have to be replaced thereby leaving the contractor with an excess supply of custom-made planks which were useful only to the School District on its high school. The contractor sought to recover against the School District for its out-of-pocket costs for the unused planks.

The Commonwealth Court in *Derry* re-affirmed that the Pennsylvania Supreme Court's decision in *Nether Providence* prohibited a contractor from recovering compensation for extra work performed under a change order which was never approved by the School Board in accordance with contract requirements. The court in *Derry*, however, noted that the builder was not seeking to recover for the increased costs of *extra* work due to a school district's oral changes to the contract. Rather, the court emphasized that the builder was claiming compensation for its reasonable costs "incurred in reliance upon the District's interpretation of the Contractor's performance under the terms

of the contract, which interpretation the District later altered to the Contractor's detriment." 517 A.2d at 229.

The *Derry* decision has no application to the facts in this case. Acmat was required under each of its contracts with the School District to remove asbestos from three Philadelphia public schools. Like the plaintiff in *Nether Providence*, Acmat now seeks to recover for extra work for which it never obtained board approval. This is not a case where the School District initially interpreted the contracts one way and later another and where Acmat had to "special order" materials which would be useless to Acmat if the School District later determined that less work and materials would be involved. *Nether Providence* remains the law in Pennsylvania and Acmat's claims are, therefore, barred due to its failure to obtain proper board approval for work it now claims is extra to its contracts.

E. Acmat Cannot Recover on a Fraud Theory Against the School District.

Acmat purports to state a fraud claim against the School District in Count VIII of the Amended Complaint. Acmat alleges, *inter alia*, (1) that the School District asked Acmat to perform various modifications and work not called for in its original contracts (Amended Complaint at ¶43), (2) that the School District represented to Acmat that it would be paid for this alleged extra work (*Id.* at ¶51), (3) that the School District made these representations notwithstanding its belief that it was not required to compensate Acmat for this work absent express approval from the School Board (*Id.* at ¶44), (4) that the School District, therefore, never had any intention to pay Acmat for this alleged extra work (*Id.* at ¶45), and (5) that Acmat justifiably relied upon these alleged misrepresentations to its detriment. (*Id.* at ¶53.)

There are at least two major deficiencies in Acmat's fraud claim, each of which requires its dismissal as a matter of law. First and foremost, Acmat's fraud count is nothing more than a thinly veiled attempt to recast contract claims as an action for fraud. A similar attempt to superimpose a tort theory of recovery

on what is essentially a contractual claim was rejected in the case of *Iron Mountain Security Storage Corp. v. American Specially Foods, Inc.*, 457 F. Supp. 1158 (E.D.Pa. 1978).

The Court in *Iron Mountain* stated the distinction between tort and contract as follows:

Tort actions lie for breaches of duties imposed by law as a matter of social policy while contract actions lie for only breaches of duties imposed by mutual consensual agreements between particular individuals. In tort actions, damages are awarded to compensate the plaintiff for all loss suffered by breach of the duty, whereas in contract actions, damages are limited by the scope of the agreement it must be foreseeable at the time the agreement is made. If a tort-feasor breaches a duty imposed by society, a monetary levy beyond that which is compensatory may be imposed against him to punish the wrongdoing and serve as a deterrent. Such punitive damages are not assessed for breach of mere contractual duties, however.

Id. at 1165.

The Pennsylvania Supreme Court has also stated that to permit tort claims for garden variety breaches of contract actions "would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with its policy." *Glazer v. Chandler*, 414 Pa. 304, 308-09 (1964).

This principle was also recognized in the case of *Argo Welded Products, Inc. v. J.T. Reyerson Steel & Sons, Inc.*, 528 F. Supp. 583 (E.D.Pa. 1981). The plaintiff in *Argo* brought suit against the defendants for providing steel which failed to meet specifications set forth in plaintiff's purchase order. The plaintiff pleaded separate counts under tort and contractual theories. The court concluded that, under Pennsylvania law, the plaintiff's tort count was insufficient. The court reasoned that any duties which may have been breached as to the plaintiff were purely contractual in nature. Tort recovery is permissible, however, solely as recompense for breaches of social obligations. Since any

duty which may have breached extended only to the plaintiff, the court held that the plaintiff could not recover for negligence.

Similarly, in this case, if there has been any breach of obligation, it would be an obligation solely to Acmat and such a breach would be purely contractual in nature. Any duties which allegedly have been breached in this case were imposed solely by a mutual agreement between the School District and Acmat. Plaintiff's claim is contractual in nature and does not involve the breach of duty imposed as a matter of social policy for which an action in tort would lie. The genesis of this matter is the underlying contracts and Acmat is not permitted to inject fraud claims into a purely contractual dispute.

Furthermore, it is readily apparent as a matter of law that Acmat cannot satisfy the necessary elements to support a fraud claim. In order to recover on a fraud claim against the School District, Acmat must prove (1) that the School District made a misrepresentation to Acmat; (2) that the representation was false; (3) that the misrepresentation was of a material fact; (4) that the School District intended that Acmat rely on the misrepresentation; (5) that Acmat justifiably relied on the misrepresentation; and (6) that Acmat's reliance on the misrepresentation was a substantial factor in bringing about damage to Acmat. *Girard Bank v. John Hancock Mutual Life Ins. Co.*, 524 F. Supp. 884, 894 (E.D.Pa. 1981), *aff'd*, 688 F.2d 820 (3rd Cir. 1982).

Acmat contends that it justifiably relied upon alleged representations by School District representatives that it would be paid for alleged extra work. If Acmat ever relied upon these alleged misrepresentations, however, such reliance was wholly at odds with the provisions in Acmat's contract which carefully set forth the procedures for the approval of extra work on the projects.

As the School District has already pointed out, Acmat expressly agreed in each of its contracts with the School District that any changes to the contracts by the School District would be subject to approval by the School Board. The contracts further provide that verbal instructions given by any of the officers, agents or employees of the Board which depart from the contract

documents, shall not be binding upon the Board. Finally, each of Acmat's contracts with the School District provide that the contracts are entered into subject to the provisions of the Public School Code of 1949 which provides that a School District may not be held liable for a contractual obligation unless the plaintiff can show that the contract was approved by formal resolution of a majority School Board members.

Given these provisions and the requirements of the Public School Code of which Acmat had actual or constructive knowledge, Acmat can hardly argue that it justifiably relied upon any alleged oral or written representation by representatives of the School District as to whether or not it would be paid for alleged extra work. Acmat was well aware and expressly agreed that any such representations by School District employees or representatives would not be binding upon the Board. The School District, therefore, is entitled to the entry of judgment on its behalf an Count VIII of the Amended Complaint as a matter of law and in accordance with the provisions of its contracts with Acmat.

F. Acmat May Not Recover Delay Damages Under its Contracts with the School District.

Acmat agreed in each of its contracts with the School District that it would not seek to recover damages from the School District if it was delayed for any number of reasons in completing its work under the three asbestos removal contracts. Each of Acmat's agreements with the School District contains the following delay damages provision:

If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor, fires, floods, epidemics, quarantine, restrictions, strikes, or freight embargoes, the period hereinabove specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall

not be entitled to any damages or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.

(Fairhill Contract at ¶17(c); Lincoln Contract at ¶15(c); Rush Contract at ¶15(c)). This clause prohibits Acmat from seeking damages from the School District even if it is delayed by acts of the employees or agents of the School District.

These contractual provisions notwithstanding, Acmat has asserted multiple claims against the School District in which it now seeks to recover damages for alleged delays it attributes to the School District. These claims which are set forth in Acmat's Statement of Claim which has previously been submitted to the Court, can be summarized as follows:

FAIRHILL SCHOOL

Item 6 — Acmat seeks in excess of \$200,000 for alleged delays due to late test reports, disruptions and acceleration in the level of work, failure of the School District's inspectors to timely inspect additional cleaning and recleaning, etc.

Item 7 — Acmat alleges it was delayed in completing its work at the Fairhill School due to a lack of elevator service.

Item 11 — Acmat contends its productivity was reduced and that its work on the Fairhill School was delayed by a requirement of the School District that its employees wear fullface respirators instead of half-face masks.

Item 12 — Acmat seeks to recover the costs it contends it had to pay to its independent air monitoring contractor for being at the Fairhill School longer than Acmat originally scheduled.

Item 13 — Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of two months.

LINCOLN HIGH SCHOOL

Item 4 — Acmat contends it lost productivity because of the alleged failure by the School District's air quality inspectors to conduct inspections on a timely basis.

Item 5 — Acmat claims its work was disrupted by a work stoppage order on or about October 20, 1984.

Item 6 — Once again, Acmat contends its productivity was lowered by a requirement of the School District that its employees wear full-face respirators instead of half-face masks.

Item 8 — Acmat seeks to recover for delays due to alleged delayed test results, disruptions and acceleration in the level work, failure of the School District's inspectors to timely inspect the additional cleaning and recleaning, etc.

Item 11 — Once again, Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of two months.

RUSH SCHOOL

Item 18 — Acmat seeks to recover monetary damages for alleged lost productivity and inefficient labor which it claims resulted from lack of heat in the building. Acmat contends loss of heat was caused by the School District's failure to provide heat during the winter months.

Item 32 — Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of ten months.

Each of the foregoing claims represents an effort by Acmat to recover for delays it experienced in completing the three asbestos removal contracts with the School District. The fact that Acmat attributes some of these delays to the School District is of no consequence. Acmat's contracts expressly provide that delay damages shall not be recoverable even in those instances where delays are attributable to the acts or neglect of the School District. The delay damages provisions could not be clearer and

Acmat must be precluded from now seeking to recover damages it freely and unequivocally agreed to forego in its contracts with the School District.

G. The School District is Entitled to Make the Final Determination as to Net Costs of Labor and Materials Under its Contracts with Acmat.

The three asbestos removal contracts between Acmat and the School District each provide that the School District may, subject to approval by the School Board, make changes in the asbestos removal contracts. The agreements further provide that the contractor may, in certain limited circumstances, be compensated on a labor and materials basis in connection with any additional work performed under the contracts. However, in each instance where the contractor performs work on a labor and materials basis, the contracts provide that the School District "will make the final determination as to net costs of labor and materials." (Fairhill Contract at ¶16(b); Lincoln Contract at ¶14(b); Rush Contract at ¶14(b)).

Two requests by Acmat for additional compensation were submitted to the School Board: the first request involved the decontamination of school books, supplies and other materials at the Rush School; the second related to the Work Practices Supplement at the Fairhill School. The School Board considered each of these requests and issued resolutions approving payment of additional compensation to Acmat. Acmat now seeks money damages for these items in an amount which exceeds the amount expressly approved by the School Board. At the Rush School, for example, the Board issued a change order in the amount of \$63,282.89 for the decontamination work performed by Acmat. The Board determined this was the reasonable value of the work performed by Acmat after spending in excess of three weeks reviewing Acmat's change order requests. Acmat, however, disagrees with this determination and seeks an additional \$65,115.33 payment on this item. (Acmat Statement of Claim, Rush School, Item 1).⁵ This portion of Acmat's claim, however,

5. Acmat also seeks additional compensation in connection with the \$18,000 change order it agreed to in connection with the Work Practices

must be rejected since Acmat expressly agreed in each of its contracts with the School District that the School District would be the final arbiter of labor and material costs under the agreements.

H. Acmat is Responsible for the Costs of Removing Asbestos Overspray at the Rush School.

Acmat seeks in excess of \$400,000 from the School District because it contends it encountered more asbestos overspray at the Rush School than it originally anticipated when it submitted its bid to the School District. Acmat describes this work as follows in its Statement of Claim:

This extra work included the scraping and cleaning of fireproofing off of duct work, conduit, pipes, hangers, in areas of the concrete slab that extended over two feet beyond the steel beams. The area of a concrete deck immediately adjacent to the beams normally contains some overspray that results when the steel beam is being sprayed. The cleaning of this area is considered to be part of the contract. However, the cleaning of asbestos containing fireproofing beyond two feet from the steel beam is considered extra because this area should not have had any fireproofing whatsoever.

(Statement of Claim at p. 39). Eugene Lord, who served as Acmat's superintendent at the Rush School, has testified that asbestos overspray typically extends from between twelve to eighteen inches on either side of the structural steel beam. (Lord Dep. at pp. 231-32).⁶ Acmat does not contend that it is entitled for reimbursement for the removal of all overspray;

Supplement at the Fairhill School. Acmat, for example, seeks \$185,000 for removing carpeting and scraping of carpet glue even though it had agreed in writing this work was included in the \$18,000 Work Practices Supplement. Similarly, Acmat seeks to recover because of alleged defective testing procedures although it had expressly agreed to these procedures in the Work Practices Supplement.

6. Relevant portions of Mr. Lord's deposition testimony are attached hereto as Exhibit "A".

rather, it complains that it is entitled to additional compensation because the overspray at the Rush School was even more extensive than originally contemplated.

Although Acmat wishes to impose the cost of removing the overspray on the School District, a close examination of the contract documents reveals that Acmat is solely responsible for this work. Acmat's asbestos removal contract for the Rush School expressly requires the removal of ". . . all asbestos containing spray-on fireproofing materials." (Specifications, Section 2080 ¶¶101C, 3.04B). The contract does not distinguish between asbestos fireproofing sprayed on steel beams and any overspray surrounding those beams. Acmat now complains that at least a portion of the overspray was not shown on drawings provided by the School District. Acmat, however, expressly agreed in its contract with the School District that anything mentioned in either of the drawings or the specifications ". . . shall be of like effect as if shown or mentioned in both. In case of differences between drawings and specifications, the specifications shall govern." (Rush School Specifications at ¶13(a)).

Furthermore, Acmat's contract with the School District expressly required Acmat to conduct an inspection of the building site prior to submitting its bid to determine the full scope of its work at the project. The contract expressly provides:

EXAMINATION OF THE SITE

The Contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully on all determinable, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same.

(Rush Contract, Special Conditions, SC-07). Acmat also agreed to the following clause in its contract:

CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for ascertaining the nature and location of the work and the general and

local conditions which can affect the work or the costs thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work *without additional expense to the School District.*

(Rush Contract at ¶7(a)) (emphasis added).

Acmat has no basis to seek to impose the costs of removing overspray on the School District due to its own failure to inspect the building site before it submitted its bids. Eugene Lord has testified that the extent of the overspray on the first floor at the Rush School was readily apparent as soon as Acmat began removing the ceiling tiles on the first floor. (Lord Dep. at pp. 229-30). Lord further testified that Acmat typically performs a thorough inspection before submitting its bids for asbestos removal contracts and that these inspections include the removal of ceiling tiles in order to look above the ceiling line. (Lord Dep. at p. 226). If Eugene Lord was able to discover the extent of the overspray on the first floor at the Rush School as soon as ceiling tiles were removed, there is absolutely no reason Acmat could not have discovered the same conditions had it taken these same steps prior to submitting its bid for the Rush School.

The Pennsylvania Supreme Court's decision in *Nether Providence* controls Acmat's overspray claim. The contractor in *Nether Providence* was also obligated to examine the site, ascertain the nature and location of the work and the general and local conditions which could affect the work or costs thereof. *Nether Providence*, 505 Pa. 42, 476 A.2d 904. The contractors sought to recover for extra work due to actual site conditions which differed from the contract documents and site plan provided by the School District. The Court rejected the claim since the School Board had never approved the extra work.⁷ Acmat's obligations under the Rush Contract were identical.

7. Similarly, Acmat's claim for breach of warranty in Count V is barred by the *Nether Providence* decision. If Acmat performed extra work as a result of inaccurate plans and specifications, without School Board approval, Acmat may not recover.

Acmat has absolutely no legal or contractual basis to pass these costs on the School District and judgment should, accordingly, be entered for the School District with respect to Acmat's overspray claim at the Rush School.

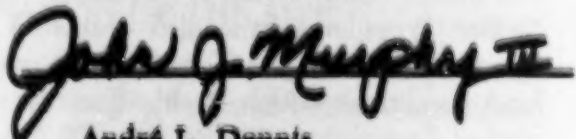
III. CONCLUSION

The terms of the agreements entered into by Acmat and the School District are clear and unambiguous. The intent of the parties is expressed in the written agreements and should be enforced according to the terms of those agreements. The contract documents clearly provide that modification to the contracts and changes in the contract prices were, at all times, subject to Board approval.

Apart from the contract documents, controlling Pennsylvania decisions prohibit each of Acmat's claims in the absence of approval by the Board. Every Count of Acmat's Amended Complaint relates to extra work performed without Board sanction.

For all of the foregoing reasons, Defendant School District of Philadelphia respectfully requests that summary judgment be entered in its favor and against Plaintiff Acmat Corporation on each Count of Acmat's Amended Complaint.

Respectfully submitted,



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*Attorneys for Defendant
The School District of Philadelphia*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
THE SCHOOL DISTRICT OF	:	
PHILADELPHIA	:	
<i>Defendant</i>	:	NO. 85-7067

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:

: SS

COUNTY OF PHILADELPHIA :

Herman Mattleman, Esquire, being duly sworn according
to law deposes and states as follows:

1. I was appointed to the Board of Education of the
School District of Philadelphia in 1981 and have served as
President of the Board of Education since December, 1983.

2. I am familiar with the provisions of the Pennsylvania
Public School Code and Acmat Corporation's contracts with
the School District of Philadelphia both of which require
approval by the Board of Education before binding con-
tracts may be entered into or before modifications or
amendments to those contracts may be undertaken.

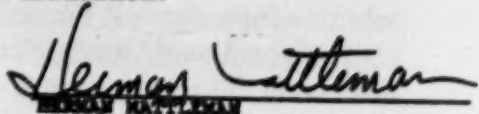
3. The School District of Philadelphia, with the ap-
proval of the Board of Education, entered into three fixed
price contracts with Acmat Corporation for the removal of
asbestos from Fairhill Elementary School, Lincoln Senior
High School and Rush Middle School. The Board of
Education did not approve nor did the School District ever
issue any change orders with respect to the work at the
Lincoln Senior High School. The School District, with
School Board Approval, and Acmat did agree on June 26,

1984 to a price change on the Fairhill Contract in the amount of \$18,000 and a change in specifications known as the "Work Practice Supplement." Under date of October 30, 1984, the School District, with School Board Approval, and Acmat entered into a Supplemental Agreement to the Rush Contract. This agreement added the first floor of the Rush School to Acmat's contract for an additional \$656,000. In addition, the School District, with School Board approval, and Acmat agreed to Change Order No. 1 in the amount of \$63,282.89 for extra labor, material and equipment necessary to wet wipe items in closets and cabinets at the Rush School.

4. Other than the amendment to the Rush Contract and the two change orders I have just reviewed, no other change orders or requests for additional compensation were ever approved by the Board of Education or issued by the School District in connection with the Rush, Lincoln or Fairhill contracts.

5. At no time did the Board of Education, by formal resolution or otherwise, ever waive compliance with the provisions of the Pennsylvania Public School Code or the provisions in Acmat Corporation's contracts with the School District which required formal approval of any modifications to Acmat Corporation's contracts by the Board of Education.

6. At no time, furthermore, did the Board of Education ever authorize any employee, agent or representative of the School District of Philadelphia to issue change orders or to otherwise enter into agreements for the payment of additional compensation to Acmat Corporation without the approval of the Board of Education.


HERMAN KATTELMAN

Sworn to and Subscribed
Before me this 15th day
of August, 1988.

R.A.29

NOTARY PUBLIC
FRANCES FIORELLA
Notary Public, Phila., Phila. Co.
My Commission Expires Aug. 29,
1988

**ANSWER OF ACMAT CORPORATION TO MOTION FOR
SUMMARY JUDGMENT OF THE SCHOOL DISTRICT OF
PHILADELPHIA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ACMAT CORPORATION

Plaintiff : **CIVIL ACTION**

v.

SCHOOL DISTRICT OF PHILADELPHIA :

Defendant :

and

**HUGHES URETHANE CONSTRUCTION, :
INC. :**

Third Party Defendant : **NO. 85-7067**

**ANSWER OF ACMAT CORPORATION
TO MOTION FOR SUMMARY JUDGMENT
OF THE SCHOOL DISTRICT OF PHILADELPHIA**

The School District of Philadelphia is not entitled to the entry of judgment on its behalf, because there exist genuine issues of material fact and because the School District is not entitled to judgment as a matter of law. In opposing the Motion for Summary Judgment, ACMAT relies upon its accompanying memorandum of Law, the exhibits thereto, and ACMAT's Memorandum of Law on Disputed or Unusual Legal Issues previously filed with its Pretrial Memorandum, a copy of which is attached hereto.

KORN, KLINE & KUTNER

BY: 

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Attorney for Plaintiff
ACMAT Corporation**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION

CIVIL ACTION

Plaintiff :

v.

SCHOOL DISTRICT OF
PHILADELPHIA

Defendant :

and

HUGHES URETHANE
CONSTRUCTION, INC.

Third Party Defendant :

NO. 85-7067

MEMORANDUM OF LAW OF ACMAT CORPORATION
IN OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT OF THE SCHOOL DISTRICT OF PHILA-
DELPHIA

I. INTRODUCTION

ACMAT Corporation ("ACMAT") entered into three separate contracts with the School District of Philadelphia ("School District") for asbestos abatement at Fairhill Elementary School, Lincoln Senior High School and Rush Middle School. ACMAT, having completed its work at the three schools, now seeks to recover damages in the amount of \$4,389,268.00, allocated as follows:

Rush	—	\$2,436,556.00
Fairhill	—	\$1,134,021.00
Lincoln	—	\$ 818,691.00

The original contracts, before extras and modifications, totaled \$2,001,283.00. Owing to defects in the contract documents as bid, the School District's requiring of extra work outside the scope of the contract, incorrect and inconsistent

interpretation and administration of the work practices under each contract, unreasonable requests by the School District personnel or its agents, and other improper acts of the School District, ACMAT's project costs rapidly escalated. The School District failed to pay amounts due ACMAT, and ACMAT now has claimed balances due under the base contract, balances due for authorized and recognized extra work, balances due for work performed beyond the scope of the original contract document, and other damages particularized in the claim submitted by ACMAT.

The School District has filed a Motion for Summary Judgment. That Motion should not be granted because there exist genuine issues of material fact, and the School District is not entitled judgment as a matter of law. The moving party has the burden of establishing the non-existence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). The School District has failed to meet this burden. Summary judgment is not appropriate if there is the "slightest doubt," concerning the existence of material facts. *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir., 1974).

The pertinent facts, conveniently overlooked by the School District, were that School District employees and agents ordered ACMAT, verbally and in writing, to perform extra work. ACMAT was threatened with termination and liquidated damages if it refused to comply with those mandates.

ACMAT submitted timely claims for additional compensation. When payment was not forthcoming, ACMAT was promised that if it continued to perform, its claims would be equitably adjusted. The School District never advised ACMAT that its claims would not be submitted to the Board of Education or that the School District never intended to pay ACMAT for millions of dollars of extra work, of which they had knowledge. How convenient to now argue that ACMAT's claim cannot be between \$5-6 million, when the base contracts total \$2,001,283.00. The explanation is simple — the School District's employment of

people untrained and incompetent in asbestos abatement, coupled with the ordering of extra work, resulted in significant cost overruns.

The facts, and the law applied to the facts, require a denial of this Motion. The balance of this Memorandum of Law will amplify upon this introductory statement and will address the relevant factual and legal issues which require denial of the School District's motion.

II. ARGUMENT

A. As A Matter Of Law, ACMAT Is Entitled To Assert A Claim For Additional Compensation From The School District Under Both The Pennsylvania Public School Code And The Contract Between ACMAT And The School District

Under the provisions of both the Pennsylvania Public School Code and the contracts for asbestos removal entered into by ACMAT and the School District, ACMAT is entitled to assert claims for additional compensation for work it performed on the three school projects. The foregoing is true even though ACMAT did receive formal approval from the School Board for the majority of the items of additional work for which it now seeks additional compensation. Under the facts of this case, the non-receipt of School Board approval does not preclude recovery of additional compensation.

1. Public School Code Requirement

Under the statutory law of the Commonwealth of Pennsylvania, a Public School Board must formally approve all contracts for work which has a value greater than One Hundred Dollars (\$100.00). 24 Pa. C.S.A. §5-508 (Supp. 1987). Such a provision includes all modifications to a contract which had been entered into by the School District. *Matevish v. Ramey Borough School District*, 167 Pa. Super. 313, 74 A.2d 797 (1950).

Absent specific statutory approval, contracts with school districts generally are not enforceable unless formally approved by the appropriate School Board. *School District of Philadelphia*

v. Framlau Corp., 15 Pa. Comm. 621, 328 A.2d 866 (1974). There are, however, exceptions to this general rule. Primarily, these exceptions include instances dealing with situations where time is of the essence and the delay in waiting for School Board approval would be detrimental to the citizens of the Commonwealth. See *In re: Chester School District's Audit*, 301 Pa. 203, 219, 151 A. 81 (1930). If an emergency or other circumstance exists which limits the time available for Board approval, a School District or Board is justified in not meeting the requirements of the statute. *Id.*

In the case of *Smith Laboratories v. Chester School District*, 33 Del. Co. 97 (1946), the Court was faced with a situation where time was of the essence and School Board approval could not be obtained in adequate time. In *Smith Laboratories*, the pupils and teachers at a certain school were being made ill as a result of unknown causes and conditions at the school. The School District, through duly authorized officers, hired an investigator to determine the cause of the illnesses. The School District, however, had taken no formal action to have the hiring of the investigator approved by the School Board. Once the investigator discovered the cause of the illness, the School District refused to accept responsibility for his bill. *Id.* at 98.

The Court held that:

In view of the emergency existing and the lack of knowledge as to what cost might be incurred, the defendant directors were fully justified in contracting for the services by their proper officers without waiting for a formal meeting in order to record the minutes of such action. Neither the time nor the conditions permitted any delay or discussion The safety of the school child is at all times the primary factor, and if necessary all requirements should be passed over in order to protect them.

Id. at 99-100.

The circumstances involved here are similar. ACMAT was involved in the removal and abatement of asbestos from three public schools during the summer break at all three schools. Its contracts provided that time was of the essence, and the hazard

imposed by the asbestos clearly jeopardized the health and welfare of the students and teachers. Faced with a constant demand for extra work from the School District, ACMAT could simply not wait for the formal approval of the Board. To do so would have created additional costs and expenses because ACMAT would have been required to stop what it was doing, clean up that area as best as possible, and begin anew in another part of the school, causing large scale inefficiencies. Once formal approval was given, ACMAT would have had to restart in each room where it was forced to stop. The asbestos removal process, which required that an isolated area be totally cleaned and kept from further contamination thereafter simply did not lend itself to a piecemeal removal process. The extra cost would have been astronomical, and re-contamination of areas would have been likely.

Furthermore, the additional costs arising from the existence of asbestos overspray in the schools and other extra work was unknown during the course of its work. From its vantage point, ACMAT could not discern a reasonable cost for the extra work and, therefore, was compelled to perform on a time and material basis. Consequently, the School District could not submit a known price to the School Board until after ACMAT was done with the extra work. The work ACMAT encountered was out of the ordinary and a price could not have reasonably been set beforehand as would have been the usual case. Thus, as in *Smith Laboratories*, unknown cost, health and safety requirements, and time requirements justified performance of extra work without Board approval.

Because time was of the essence, the health and welfare of the citizens of the Commonwealth were involved, and the value of the work to be performed was unknown, the statutory provision requiring formal approval by the School Board could not have possibly been met at the time the work was to be done. This does not mean, however, that the statute should be disregarded. On the contrary, once the work had been completed for each change order, the School District, as required by the contract, should have made an equitable adjustment to the Contract amount. See, e.g., Fairhill contract §16, quoted *infra*

in Section IIB. When such an adjustment was made, the School Board would make the final approval of the adjustment and enter its approval into the School Board minutes as required by the statute. As with any act of government, a reasonableness standard would be applied to School Board approval at that time. It was inequitable and unconscionable for the School Board to use the statute at that time to withhold payment from ACMAT.

The cases cited by the School District in its Memorandum of Law in Support of its Motion for Summary Judgment do not involve the conditions present here. The *Framlau* case, *supra*, involves a situation in which a plaintiff entered into a settlement agreement with the School District which was approved by the counsel for the School Board and the School Board president. *Framlau*, *supra*, 328 A.2d at 868. The Board, however, later rescinded the settlement agreement, saying that it was never formally approved by the Board as required by the statute. *Id.* at 869. The Court held for the School Board and ruled that the settlement agreement was unenforceable. That case does not involve a "time of the essence" problem, a health and welfare question, or a situation where the costs of the changes in the contract were unknown. Furthermore, the contract in *Framlau*, unlike those here, was expressly *conditioned* on subsequent approval by the Board, and did not affirmatively provide for an equitable adjustment. *Id.* at 870. Consequently, *Framlau* is clearly distinguishable from this case.

The *Matevish* opinion, *supra*, is distinguishable on the same grounds. There, a conflict arose when a plaintiff furnished a six year old bus rather than a new one as required under the transportation contract entered into with the School District. The use of the old bus was agreed to orally but was never formally approved by the School Board. *Matevish*, 167 Pa. Super. at 315-16. The Court ruled that the modification of the contract had to be approved by the School Board and, therefore, the contract was unenforceable. *Id.* at 317. *Matevish* does not involve questions of time, health, welfare, or uncertain costs. Nor did the contract involved require an equitable adjustment. The case deals with a bus, not the removal of asbestos which had

to be done in a limited amount of time and with the safety of the public in mind. It is therefore inapposite.

2. Contract Requirements

The requirement for approval by the School Board outlined in 24 Pa. C.S.A. §5-508 is supplemented by a provision in the contract between the School District and ACMAT which subjects adjustments to the contract or contract price to School Board approval. The clause states, "If such changes cause an increase or decrease in the contractor's costs of, or time required for, performance of the contract, an equitable adjustment *shall* be made and the contractor notified in writing accordingly, any such change in the contract price being subject to the approval of the Board." Fairhill contract, General Conditions, §16(a) (emphasis added).

Under such a provision, ACMAT is entitled to an equitable adjustment to the contract for any changes in the drawings or specifications of the contract. If such a change is made, the new contract price is subject to the approval of the School Board. Such clauses have been the subject of numerous legal actions in Pennsylvania, as well as other jurisdictions.

The School District seeks to bar ACMAT's claim for additional compensation for extra work by relying extensively on the case of *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In *Durkin*, the contractor entered into a contract for the construction of a new high school. Soon after the construction began, the contractor noticed discrepancies between the site plan provided by the School District under a separate contract with an engineering firm and the actual site conditions. The resolution of these discrepancies required additional work. The Authority's president sent a letter to the contractor recommending that the contractor continue working on the project and that the problem would be resolved at a later date. Relying on the president's representation, the contractor completed the work despite a contract provision requiring all change orders for extra work to first be approved by the School Board.

Rejecting the contractor's claim for additional compensation, the Court concluded that it was the duty of the contractor to anticipate in its bid additional excavation work. *Id.* at 906. In reaching its conclusion, the Court relied heavily on a contractual provision that gave the contractor the responsibility to determine the amount of "cut and fill" needed to complete the job, and to examine the site personally to satisfy himself as to the nature, character, quantity, and quality of work necessary for the job.

The Court in *Durkin* also rejected the theory accepted by the lower court that the president's letter constituted a waiver of the written order requirement. In reversing the Superior Court, the Supreme Court stated that the waiver of a public contract provision dealing with change orders can be accomplished only by formal written action and that the president's letter was not the act of the Board and only ambiguously referred to the disagreement between the parties. *Id.* at 907. The Court went on to state, "We have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body." *Id.*

The *Durkin* case is factually distinguishable. First, the Court held in *Durkin* that apart from the question of Board approval, the contractor should have foreseen the condition requiring the extra work because the contract in *Durkin* imposed the responsibility on the contractor to determine the amount of cut and fill needed to complete the job. The contractor was aware of those duties and had every opportunity to make his own estimate of the necessary excavation and submit a bid including the additional excavation costs. Thus, *Durkin* stands for the proposition that a contractor is required to follow contract provisions requiring a site inspection.

Here, the extensive problems encountered by ACMAT could not have been known at the time of the initial inspection.

There is a clear factual dispute on this point. The significance of this fact becomes even clearer when one considers that ACMAT spent over four times its original estimate and over four times the estimate of the School Board. ACMAT's extra work was simply not reasonably foreseeable. The fact that the asbestos in the school was originally applied in an out-of-sequence manner, creating a substantial overspray problem that is unc customary in the trade, added to the unforeseeability of the extra work demanded by the School District.

Second, a large part of the additional work performed by ACMAT did not require the modification of plans and specifications as was required in *Durkin*. Instead, ACMAT's additional work simply involved an interpretation of the plans and specifications in a rational, commercially feasible manner. Rather than the discovery of a single unforeseen condition, the facts here involves cardinal changes in the scope of ACMAT's work and the unfair administration and supervision of the Project by the School Board's air monitoring inspectors.

Finally, a major distinction between this case and *Durkin* is the purpose behind the two contracts. In *Durkin*, the contract was for the building of a new high school. Time was not of the essence, nor was the health and welfare of the citizens of the Commonwealth involved in the Project. Here, ACMAT's duties under the contract consisted of the removal of a dangerous substance from the halls of public schools during the summer break between terms. ACMAT was under enormous pressure to get the work done and to do it in a safe and expeditious manner. It did not have the luxury to stop in the middle of the project and wait for formal approval of a change order by the School Board, which, according to deposition testimony, typically takes more than thirty days to accomplish. Given the fact that time was of the essence, the job had to proceed without the issuance of formal change orders.

Applied to the fact of this case, *Durkin* cannot govern. The health and welfare of the citizens of the Commonwealth must take precedence over the protection of public funds.

The School District's reliance on *Morgan v. Johnstown*, 306 Pa. 456, 160 A. 696 (1931); *Montgomery v. Philadelphia*, 391 Pa.

607, 139 A.2d 347 (1958); *Dick Corporation v. State Public School Building Authority*, 27 Pa. Comm. 498, 365 A.2d 663 (1976); *Commonwealth Department of Transportation v. Burrell Construction Supply Co.*, 86 Pa. Comm. 62, 483 A.2d 589 (1984) and *Commonwealth Department of Transportation v. Anjo Construction Co.*, 87 Pa. Comm. 310, 487 A.2d 455 (1985) is also misplaced. None of the above cases deal with the fact situations even remotely similar to this case. For example, in the *Morgan* case, the Court ruled that "if the plaintiff was not willing to proceed under the contract, he should have refused to go on with the work until he obtained the proper written authority of the engineer." *Morgan*, 306 Pa. at 465. The facts here clearly reflect that ACMAT did not have the luxury of being able to wait for the proper authority of the School Board. Not only was time of the essence because of the possible health hazard caused by the asbestos, but the School District constantly threatened ACMAT with penalties for liquidated damages clauses of the contracts. Furthermore, unlike the *Montgomery*, *Burrell* and *Anjo* cases, the problem between the school District and ACMAT does not involve a single change order, but rather a continuous pattern whereby the School District would state that ACMAT was to proceed on a time and material basis for the extra work. If ACMAT did not proceed, the School District threatened termination of the contracts and extensive liquidated damages. While the *Dick* case is cited by the School District for the holding that a contractor may refuse to perform until it receives the contractually required written authorization, such a delay was not feasible in ACMAT's situation and would have caused extra work above that complained of in the present case.

Outside of the Commonwealth, several other jurisdictions have found that the written School Board approval requirement for extra work could be waived in circumstances in which time was of the essence. In *Stahelin v. Board of Education*, 87 111. App.2d 28, 230 N.E.2d 466 (1967), a contractor entered into a contract to build a new junior high school. Soon after work began, there was a change in the plans caused by architectural error. *Id.* at 467. As a result, the contractor incurred extra costs in construction. Under the applicable school code, extra costs

were required to be approved formally by the School Board. *Id.* at 465. However, the contractor continued work on the representations of the architect that the extra costs would be paid. In addition, several members of the School Board advised the contractor that all instructions were to be from the architect only. *Id.* at 469. As a result, not only did the Board not authorize the extra work, but it was not even fully aware of the changes made until after the job was completed.

The Court in *Stahelin* found that the provisions in the school construction contract requiring School Board approval for extra work was for the sole benefit of the School Board and could be waived by it. *Id.* at 470. The Board's delegation of authority to the architect resulted in such a waiver. Furthermore, time was of the essence in the building contract. The Court noted that the changes were of such a nature and made in such a time that if the contractor had halted construction and waited for the next Board meeting, the building would not have been completed on time and the contractor would have been open to severe criticism. *Id.* In addition, the Court held that the Board was aware that any extra work performed would be adjudicated upon completion of the work. Consequently, they were estopped from denying their obligation to pay simply because no formal action of "yeas and nays" had been taken. The Court's reasoning was that without so estopping the School District, it would have resulted in serious unjust enrichment. *Id.*

Here, although changes in the contract ostensibly required written approval of the Board, the Board in fact delegated its authority to the School District. Furthermore, ACMAT was threatened with cancellation of the contract and possible legal action if it did not complete the work as scheduled. As a result of this pressure, ACMAT was forced into continuing work on the projects without waiting for the formal written approval of the School Board. Moreover, time was of the essence and there was a severe threat to the health and welfare of the citizens of the Philadelphia area if the work was not completed in a timely manner. Finally, the School District should be estopped from denying its obligation to pay ACMAT because it was well aware of the extra work required as evidenced by the fact that letters

were sent authorizing the extra work. Consequently, the Board would be unjustly enriched if it could reap the benefits of ACMAT's performance without fully compensating the contractor. See also *Lindbrook Construction v. Mukilteo School District No. 6*, 458 P.2d 1 (Wash. 1969) (holding that a School District was estopped from denying its obligation to pay when its representative directed work to proceed without a written order, even though one was required by the contract) and *C. Norman Peterson v. Container Corp.*, 218 Cal. Rptr. 592, 172 Cal. App. 3d 55 (1985) (holding that clauses requiring change orders to be approved in writing can be waived by an extremely tight time schedule as well as cardinal changes to the scope of the contract).

The case law upon which the School District relies is clearly distinguishable. None of those cases contain clauses providing for an equitable adjustment of the contract; none of them involve a situation in which time is of the essence; none of them involve circumstances which would not permit a contractor to simply stop its work and wait for the approval of the School Board; and none of them involve a continual pattern of threats of termination and liquidated damages which force the contractor to continue. To allow a School District to take advantage of a contractor because of such conditions would work an immense injustice. In such a situation, the oral or written directives of the School District representatives must be held to be the equivalent of School Board approval. If they do not rise to that level, the directives must be found to have given ACMAT the right to an equitable adjustment which would be subject to the reasonable approval of the School Board at a later time.

ACMAT is not attempting to circumvent either the statute or the contractual requirement of School Board approval. Rather, it is attempting to abide by these provisions as best it can under the circumstances involved. Given the conditions under which ACMAT was performing its contractual duties, it would have been unreasonable for ACMAT to await School Board approval. Furthermore, to allow the School District to take advantage of ACMAT's position with the School District's endless threats of termination and liquidated damages and for

the School District to later argue that ACMAT is not entitled to further compensation because of the statute or contractual provisions would create a grave inequity. While the purpose of these provisions is to protect the public from fraud and a plundering of its treasury, they should not be used to allow the School District to plunder its contractors.

B. As A Matter Of Law, ACMAT Is Entitled To Assert A Claim For The Reasonable Cost Of Work Performed Beyond The Scope Of Its Written Contracts, Under Theories Of Equitable Estoppel And Quasi-Contract

Even if the Court were to conclude that ACMAT is not entitled to compensation for extra work performed because such work was not formally approved by the School Board in writing, ACMAT is nonetheless entitled to reasonable compensation under quasi-contract and estoppel theories. ACMAT's claims under these theories are supportable based on the terms of the School District's contracts, and as a matter of law.

The School District's arguments against quasi-contract and estoppel recovery are simply regurgitations of its argument that the School Code and written contract provisions required School Board approval for work beyond the scope of the contracts. The School District argues that if a party does not expressly comply with a contractual provision requiring written approval of a public Board or authority, recovery under an estoppel or quasi-contract theory may *never* be had, no matter what the facts or circumstances. This is allegedly so because, otherwise, the sanctity of the formal approval process would be violated. School District Memorandum of Law, pp. 17-19.

The School District's argument that ACMAT is entitled only to compensation for School Board approved changes in the contracts ignores the terms of the contracts which expressly, and affirmatively provide for an "equitable adjustment" to compensate ACMAT for work beyond the scope of the contract. Each contract's General Conditions provides, as in Section 16 of the Fairhill contract:

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(a) The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in contract price being subject to the approval of the Board.

(b) The determination of the increase or decrease in compensation to be paid to the contractor for additions to or reductions in the work, respectively, shall be determined by application of unit prices when such are set forth in the Special Conditions of the contract, or in those cases where unit prices are not applicable, by a lump sum mutually agreed upon by the Board and the contractor. If however, unit prices are not applicable and if the parties cannot agree upon a lump sum, then additional compensation to be paid the contractor shall be determined by the actual cost in labor and materials, plus fifteen percent (15%) for profit and overhead. Reductions in the contract price in the form or credits shall be determined by the actual net cost in labor and materials if the aforementioned lump sum cannot be agreed upon. The fifteen percent (15%) for profit and overhead will be retained by the contractor. The School District will make the final determination as to net cost of labor and materials.

(c) Should the contractor encounter subsurface and/or other conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the School District of such conditions, before they are disturbed. The School District will investigate the conditions and if it finds that they materially differ from those shown on the drawings or indicated in the specifications, it shall make such changes in the drawings and/or specifications as it may find necessary.

Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes.

(d) Verbal instruction given by way of the officers, agents, or employees of the Board which depart from the contract documents shall not be binding upon the Board.

Subsection (a) specifically requires "equitable adjustments" in the contract price. Use of the word "shall" mandates an equitable adjustment where contract changes cause an increase in the contractors cost of or time for performance. Although Subsection (a) states that any increased cost of performance is "subject to approval of the board", *mandatory* language of the contracts relating to equitable adjustments in the contract price created an affirmative obligation of the School District to present all such requests for equitable adjustments to the School Board, and required the School Board to exercise reasonableness in evaluating requests for equitable adjustments. The contract's language mandating an "equitable adjustment", "subject to" School Board approval does *not* make Board approval a condition precedent to recovery. At best, it creates an ambiguity in the contract with respect to whether and when Board approval was required, which, since it was drafted by the School District, must be resolved against it by implying a requirement that the School Board employ a "reasonableness" standard in its review of any requests for equitable adjustment. See Restatement (Second) of Contracts, §205.¹

None of the cases cited by the School District in opposition to recovery in quasi-contract or estoppel involve contracts, like those here, with affirmative language *mandating* equitable adjustments. That the contracts make the equitable adjustments "subject to School Board approval" does not require that such adjustments be *rejected*. To the contrary, the contract language

1. That the contracts contemplate reasonableness in determining the amount of an equitable adjustment is bolstered by Subsection (b) which sets forth a formula for compensation in the absence of an agreement between the School District and a contractor.

imposes a good faith obligation on the School District to present all claims to the School Board, and on the School Board to fairly and reasonably evaluate them. *See Tamaqua Borough v. Rush Township Sewer Authority*, 85 Pa. Comm. 421, 482 A.2d 1167, 1173 (law implies agreement to perform things according to reason and justice that party should perform in order to carry out purpose for which contract was made and to refrain from doing anything that would destroy other party's right to receive fruits of contract). Absent application of this standard, it cannot be said that the adjustment process imposed by the contracts was in any sense "equitable",² as required by the contracts.

The record before this Court reflects a consistent pattern of oral and written School District approvals to ACMAT to perform work beyond the scope of its written contracts. *See Exhibits 1-35*. In reliance on these explicit instructions, ACMAT performed hundreds of thousands of dollars of extra work. Yet, it is uncontroverted that most of ACMAT's requests for extra work were never even placed before the School Board for review, let alone fairly considered by the School Board for equitable adjustment. *See Exhibits 42-44*. The School District's contracts state that an equitable adjustment *shall* be made for extra work. Thus, the School District's argument, reduced to essentials, becomes a tautology: ACMAT cannot be accorded equitable relief because the School Board (although permitted to approve equitable relief) was not given the opportunity to approve payment for alleged extra work performed by ACMAT.³ Buried within the rationale of this argument lies this flawed premise: the School Board is the sole and exclusive arbiter of ACMAT's

2. "Equitable" means "Just; conformable to the principles of justice and right . . . just, fair, and right, in consideration of the facts and circumstances of the individual case." *Black's Law Dictionary*, Revised 4th Ed.

3. The discovery record establishes that many of ACMAT's requests for compensation for extra work were considered and *rejected* by lower level School District officials, without further review by the School Board. (*Exhibits 42-43*). In so doing, the School District officials clearly acted as agents for the School Board. If agents in rejecting ACMAT's claims, these School District officials must also be agents, binding the School Board, for all extra work *approved* by them and on which ACMAT was instructed to proceed.

entitlement to equitable compensation. The contracts do not so provide, as they mandate equitable adjustment for extra work performed.

In none of the cases cited by the School District did the contracts involve certain clauses, like those in this case, affirmatively mandating an equitable adjustment for extra work. In *Commonwealth v. Seagrams Distillers Corporation*, 379 Pa. 411 (1954), an oral contract for the transportation and delivery of liquor was construed. Quasi-contract recovery was denied, therefore, in the absence of an affirmative contract provision, as here, mandating an equitable adjustment. Once the School District chose to provide for an equitable adjustment in AC-MAT's contract price, it exposed itself to quasi-contractual relief based on principles of estoppel. *Montgomery v. Philadelphia*, 391 Pa. 591 (1958) is not to the contrary. In that case, the contract provided that no claim for extra work would be allowed unless "ordered in writing by the engineer and approved by the recreation commissioner", a condition precedent to recovery. Here, the contract creates a right to an equitable adjustment, subject to subsequent School Board approval. This right to an equitable adjustment cannot be unreasonably withheld, given the contract language. See *Teodori v. Penn Hills School District Authority*, 413 Pa 127, 196 A.2d 306 (1964).

The School District also argues that ACMAT is not entitled to *quantum meruit* recovery because "ACMAT failed to proceed in accordance with the requirements of the School Code" to obtain School Board approval. However, the question of whether School Board approval was improperly withheld by the School District is a question of fact which can be resolved only upon determination of whether the work performed by ACMAT was in fact an extra to the contract. ACMAT has alleged: that certain work which the School District required was a "cardinal change" to the contract which fundamentally altered the contractual undertaking; that unforeseen and unforeseeable conditions existed which created "differing site conditions" creating a right to additional compensation: and that the School District actively interfered with its work, thereby creating additional costs. Equitable adjustment for the claimed extra work is

contemplated by the contracts, subject to reasonable and fair approval and evaluation by the School Board. Because the question of whether the School Board actually, or should have, reviewed ACMAT's requests for extra compensation in a reasonable and fair way is one of fact, summary judgment should not be granted.

The disputed facts giving rise to ACMAT's claim have been fully developed in discovery. ACMAT can prove that it received written directives from high level and project level School District employees to perform thousands of dollars of extra work. The School District had an affirmative duty, based on the contracts, to submit ACMAT's requests for additional compensation to the School Board, and the School Board was required to promptly, fairly, and reasonably review those requests. As developed in discovery, neither the School Board nor the School District fulfilled their obligations. *See Exhibits 42-43.*

It is overwhelmingly clear that ACMAT relied on instructions from School District employees in performing large amounts of extra work. To prohibit recovery *as a matter of law* would be to permit the School Board to use its potentially bad faith refusal to evaluate ACMAT's claims as a sword to preclude ACMAT from proving its entitlement to compensation. The law does not and should not sanction this harsh result.

Where a contractor relies to his detriment on representations of a public authority, Pennsylvania law provides a quasi-contractual remedy based on estoppel. In *Derry Township School District v. Suburban Roofing*, 102 Pa. Comm. 54, 517 A.2d 225 (1986), the court held that theories of equitable and promissory estoppel *are* applicable to public contracts and governmental agencies, and expressly rejected a School District's contention that a construction contract with a clause requiring all changes to be in writing was not subject to a claim based on promissory or equitable estoppel. The court explicitly held that the doctrine of promissory and equitable estoppel *are* applicable to public contracts. 517 A.2d at 228-229.

In *Derry*, a School District official modified the amount of material which it had previously orally ordered a contractor to procure pursuant to a contract for replacing a roof. Because the

contractor had relied on an earlier representation, it had ordered material some of which was useless as a result of the changes. The change had not been approved in writing as required by the contract. The court held that because the School District had induced the contractor to purchase supplies which thereafter could not be used, promissory or equitable estoppel prevented it from denying liability. *Id* at 229.

The School District attempts to distinguish *Derry* from this case because, supposedly, "this is not a case where the School District initially interpreted the contracts one way and later another in which ACMAT had to 'special order' materials which would be useless to ACMAT if the School District later determined that less work and materials would be involved". School District Memorandum of Law, p.22. To the contrary, this *is* a case where differences in contract interpretation by the School District resulted in the expenditure of huge amounts of additional labor and material. The proper scope of ACMAT's work under the contracts forms the primary basis for much of its claim. During its performance, ACMAT and the School District were continually at odds over what was expected of ACMAT under the contract; this case is almost exclusively about differences in contract interpretation. Because the essence of the dispute between ACMAT and the School District is one of contract interpretation, and the proper scope of work as defined in the contracts, equitable and promissory estoppel theories, pursuant to *Derry*, are cognizable against the School District.

Moreover, the contracts in this case affirmatively *require* an equitable adjustment for work performed which is outside the scope of the contracts. To argue that the mandate of *Derry* does not apply here merely because "special order" materials are not involved is to unfairly and disingenuously limit its holding, and would produce the absurd result of permitting estoppel claims against public authorities only where its promises resulted in "useless" materials being ordered. *Derry's* holding is not so limited; it permits recovery against a public agency based on

estoppel principles where, as a result of contract interpretation, work outside the scope of a contract is performed.⁴

In deciding the issue of ACMAT's entitlement to recover based on equitable and promissory estoppel principles, the Court should be mindful that the doctrine of equitable estoppel is one of fundamental fairness. *Brog Pharmacy v. Department of Public Welfare*, 87 Pa. Comm. 181, 687 A.2d 49 (1985). Pennsylvania law emphatically authorizes recovery against public agencies based on estoppel principles. *Plymouth Twp. Council v. Montgomery Co.*, 531 A.2d 1158, 1162 (Pa. Comm. 1987); *Commonwealth v. Dixon Contracting Company*, 80 Pa. Comm. 438, 471 A.2d, 934 (1984); *Frank v. County of Greany*, 50 Pa. Comm. 30, 412 A.2d 663 (1980).

Here, the facts as developed in discovery reflect that the School District repeatedly ordered ACMAT to perform work, much of which ACMAT believed to be outside the scope of its contracts. See Exhibits 1-37. In so doing, the School Board repeatedly represented in writing to ACMAT that it would be compensated for extra work. Yet, the facts reflect that the School District presented only two change order requests to the School Board, leaving the lion's share of ACMAT's claims for extra work compensation, totalling hundreds of thousands of dollars, *unreviewed* by the very Board whose review is *required* by the contracts! ACMAT had no control over the School Board review process. Therefore, the School District had an affirmative obligation to submit all of ACMAT's claims to the School Board; it clearly did not do so. To grant summary judgment to the School District based on lack of School Board approval would be

4. The *Derry* decision distinguishes *Nether Providence Twp. School Authority v. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984) because *Derry* involved "contract interpretation" and *Durkin* involved the enforceability of an oral change order. The *Durkin* decision did *not* bar estoppel claims against public authorities; it held simply that based on the facts of that case an oral change order was not enforceable. Where, as here, the primary issue is one of contract interpretation, *Derry* is clearly incompatible with *Durkin* and permits recovery, based on estoppel theory, for claims based on oral and written representations of School District officials, whether or not formally approved by the School Board.

to condone a system in which authorized representatives of a School District can: 1) repeatedly instruct a contractor, orally and in writing, to perform work which the contractor believes to be beyond the scope of a contract; 2) promise orally and in writing that the contractor will be paid for this work; 3) threaten the contractor with termination of its contract and liquidated damages if the extra work is not performed; 4) fail to submit the contractor's requests to the School Board for approval; and 5) then claim that lack of final School Board approval acceptance precludes recovery by the contractor. The aforescribed process would give a license to public school districts to use lack of School Board approval as a sword to defeat contractors, legitimate claims for work performed based on express instructions from School District officials. This would surely be the moral equivalent of acquitting a child for the murder of his parents because he was an orphan! Not having followed its own contract, the School District cannot use that contract's processes to defeat ACMAT's claim.

Equity will not allow a School District to act as both judge and jury with respect to a contractor's claim. Given that ACMAT's contracts affirmatively require an equitable adjustment, that the facts reflect that the School Board was given the opportunity to review or approve ACMAT's extra work claim, and that ACMAT performed work based on written and oral promises of compensation from School District officials, ACMAT's claims based on equitable and promissory estoppel are cognizable as a matter of law.

Lastly, a substantial portion of ACMAT's claim for equitable adjustment arises from unforeseen conditions which required an inordinate amount of work not anticipated by ACMAT. For instance, ACMAT claims that asbestos overspray on large portions of concealed portions of the Rush School was unforeseeable and resulted in a significant amount of additional work.

Subsection (c) (e.g. section 16(c) of the Fairhill Contract) of the contracts' general conditions quoted above provides for adjustment to the contract price arising from the discovery of conditions materially differing from the drawings or specifications. School Board approval of the increase or decrease for work

created by unforeseen conditions is *not* required by the contract. Section 16(c) provides for adjustments of the contract price for unforeseen conditions in the "manner provided herein". Section 16(b) provides for the manner of adjustment to the contract price adjustment and is *silent* as to School Board approval. Thus, contract adjustments based on unforeseen conditions under the contracts did *not* require approval by the School Board.

In *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964), the Pennsylvania Supreme Court held that a School District's contract which provided for price adjustments for unforeseen conditions without formal School Board approval could be adjusted even though such adjustments were not done in writing. 196 A.2d at 309. As in *Teodori*, so here the contract allows adjustments in price for work arising from unforeseen conditions, without regard to School Board approval. The School District is therefore not entitled to summary judgment with respect to ACMAT's claim for compensation for work arising from unforeseen conditions.

C. The School District's Motion For Summary Judgment On The Fraud Count Should Be Denied

In its Motion, the School District argues that ACMAT should not be permitted to recover on its fraud theory. However, ACMAT's fraud theory is viable and should withstand the School District's Motion for Summary Judgment, in that: (1) this Court has already ruled on a large part of the School District's Motion regarding fraud; (2) ACMAT's fraud claim is separate and distinct from ACMAT's breach of contract claims and may be pursued independently; and (3) there are genuine issues as to the material facts forming the basis of ACMAT's fraud claim.

At an earlier stage of this litigation, the School District filed a Motion to Dismiss the fraud count (Count VIII) of ACMAT's Amended Complaint. This earlier Motion raised arguments which overlap those presently before this Court, and the Court ruled in favor of ACMAT. For instance, the School District argued there, as it does in the present Motion, that ACMAT's

fraud count was a "thinly veiled attempt to contract claims as an action for fraud." The Court issued an Order, dated January 8, 1987, which denied the School District's Motion to Dismiss Count VIII of ACMAT's Amended Complaint. By raising arguments in the present Motion which are similar, if not identical, to those raised in the earlier motion, the School District is, in effect, impermissibly seeking review of this Court's earlier unappealable Order denying the Motion to Dismiss. Under the law of the case doctrine, the January 8, 1987 Order—to the extent that it rejected the School District's arguments raised again in the present Motion—is controlling and precludes the granting of the Motion for Summary Judgment as to the fraud count. The School District's present Motion is a thinly veiled attempt to recast its Motion to Dismiss as a Motion for Summary Judgment.

In any event, ACMAT is permitted under the law to pursue its fraud claim, despite the fact that it has brought contract claims in the same action. The fraud count is independent of ACMAT's contract claims. *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*, 457 F.Supp. 1158 (E.D. Pa. 1978), cited by the School District as authority "or the distinction between tort and contract actions, involved a motion to dismiss a tort claim based on bad faith or malicious breach of non-insurance contractual duties. The claim did not involve fraud, and the case is inapposite. The Court there concluded that Pennsylvania would not allow tort recovery for the breach of an implied contractual duty of good faith and fair dealing under the circumstances and therefore dismissed the count alleging that claim. The Court in *Iron Mountain* did not state that a party is barred from bringing a fraud cause of action based upon misrepresentations made in connection with a contractual undertaking.

Argo Welded Products, Inc. v. J.T. Ryerson Steel & Sons, Inc., 528 F.Supp. 583 (E.D. Pa. 1981), also cited by the School District, likewise did not involve a claim based on fraud. There the plaintiff pursued claims for breach of contract and negligence

in supplying non-conforming goods. The failure to supply non-conforming goods was in actuality a breach of the contractual obligation, and therefore the cause of action in *negligence* was dismissed.

Where a plaintiff's claim is based on the tort theory of fraud, the plaintiff is permitted to pursue the fraud cause of action, even if it arises from contractual undertakings and even if the plaintiff is simultaneously pursuing a breach of contract theory. In *Shulman v. Continental Bank*, 513 F.Supp. 979 (E.D. Pa. 1981), plaintiffs' Complaint contained five counts, including counts for breach of contract and fraudulent misrepresentation in connection with the underlying contract. The defendant filed a summary judgment motion, and the Court denied the motion as to both the contract count and the fraud count. The Court did not even question whether the plaintiff could proceed on both grounds simultaneously, as it was evident that one theory of recovery would not preclude the other.

Similarly, in *Olkowski v. The Prudential Insurance Company of America*, 584 F.Supp. 1140 (E.D. Pa. 1984), the plaintiff's Complaint alleged both breach of contract and fraud. The defendant sought to have the fraud count dismissed, and the Court denied the Motion. Claims for breach of contract and fraud, even when the fraud arises from the contract, are not mutually exclusive. See *Bolus v. United Penn Bank*, 363 Pa. Super. 247, 525 A.2d 1215 (1987) (Court affirmed jury's verdict in favor of plaintiff in suit alleging both breach of contract to provide financing for construction project and negligent misrepresentation to fund the project).

The School District finally argues that ACMAT cannot have justifiably relied on the School District's misrepresentations. The issue of ACMAT's reliance is a disputed factual issue to be presented to the jury. ACMAT proceeded with its work under the contract and with the extra work, based on the School District's instructions and in reliance on the representations of the School District that ACMAT would be paid. See Exhibits 1-49. it is a question of fact as to the reasonableness of ACMAT's

reliance on the representations of the School District, considering all the circumstances, including ACMAT's reasonable expectations that the School District was taking any necessary steps to obtain the School Board's approval and the School District's continued assurances that ACMAT would be paid for its extra work.

D. A Factual Dispute Exists With Respect To The Enforceability Of That Portion Of The Contracts Purporting To Exclude Damages For Delay

The School District seeks summary judgment with respect to ACMAT's recovery of delay damages based solely on the application of a "no damage for delay clause" in the contracts. However, a factual dispute exists as to the enforceability of the no damage for delay clause which precludes the granting of summary judgment.

A "no damage for delay" clause in a contract is an exculpatory clause which is to be strictly construed so as to avoid manifest injustice. As a result, a number of well-established exceptions to the enforceability of no damage for delay clauses have been created. See generally 74 A.L.R.3d 187 (1976).

Pennsylvania courts are reluctant to enforce "no damage for delay" clauses, and have created a number of exceptions to their enforceability. For example, in *Commonwealth Dept. of Highways v. S.J. Groves & Sons, Inc.*, 20 Pa. Comm., 526, 343 A.2d 92 (1975), the court refused to enforce a no damage for delay clause where the owner caused delays by interfering with the contractor's access to a portion of the construction site for an extended period of time. Accord, *Gasparini v. Pa. Turnpike Authority*, 409 Pa. 465, 187 A.2d 157 (1963), *Sheehan v. City of Pittsburgh*, 213 Pa. 133, 62 A.642 (1905).

Here, ACMAT claims that the School District actively interfered with its performance of the contracts by poor administration and through contract interpretation creating burdensome requirements not found within the specifications. At the time it entered into the contracts, ACMAT could not have contemplated the delays it would sustain as a result of the School

District's interference into the manner in which it would perform its contracts. The delays sustained by ACMAT therefore do not come within the ambit of the "no damage for delay clause," *Commonwealth State Highway & Bridge Authority v. General Asphalt Paving Co.*, 46 Pa. Comm. 114, 405 A.2d 1138 (1979).

Moreover, a factual dispute exists between ACMAT and the School District as to whether the School District prevented ACMAT from timely performing its contracts. When one party to a contract prevents or impedes performance by the other party, it may not avail itself of exculpatory contract provisions which benefit it. Simply put, a party to a contract may not take advantage of its own breach thereof. *Rainier v. Champion Container Co.*, 294 F.2d 96 (3rd Cir. 1961); *Craig Cool Moving Co. v. Romaini*, 513 A.2d 437, 355 Pa. Super. 296 (1986), alloc. granted 522 A.2d 50. A question of fact exists here as to whether the School District breached its contracts with ACMAT by actively interfering with ACMAT's performance. Therefore, applicability of the "no damages for delay clause" must await resolution of the aforementioned factual dispute. The Motion for Summary Judgment should therefore be denied.

E. The School District Does Not Have Total, Unrestrained Authority To Determine The Net Costs Of Labor And Materials For Purposes Of ACMAT's Compensation For Additional Work

In its Memorandum of Law, the School District takes the position that in certain circumstances, it has the right to make the final determination as to net costs of labor and materials for purposes of compensating ACMAT for additional work performed. The School District claims that in these circumstances, it is the "final arbiter of labor and material costs." School District Memorandum of Law, p. 32. The School District fails to acknowledge that any right it may have to determine labor and material costs is subject to the standards of reasonableness and good faith, which are superimposed on contracting parties by law.

It is well-recognized that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts. §205. See *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247, 255 (1986) (evaluation and review process of faculty member must be honest and meaningful, not a sham formality designed to ratify an arbitrary decision already made); *Germantown Manufacturing Co. v. Rawlinson*, 341 Pa. Super. 42, 491 A.2d 138, 148 (1985) (court imposed on contracting party a promise to act in good faith in determining and setting amount owed); *Loos & Dilworth v. Quaker State Oil Refining Corp.*, 347 Pa. Super. 477, 500 A.2d 1155, 1160 (1985). See also *Daniel B. Van Campen Corporation v. Building and Construction Trades Council*, 202 Pa. Super. 118, 122, 195 A.2d 134 (1963) (law implies agreement by contracting parties to perform those acts that according to reason and justice they should perform in order to carry out purpose of contract and to refrain from doing anything that would injure other party's right to receive fruits of contract).

Thus, in making any adjustment in compensation payable to ACMAT for work performed, any determination of the School District must be within the confines of good faith and reasonableness. ACMAT disputes the good faith and reasonableness of the School District in making such determinations under the contract. See report of Kellogg Corporation concerning damages, which was submitted with ACMAT's pretrial memorandum. Whether or not the School District exercised good faith and reasonableness is a factual issue in dispute. The School District has pointed to no factual basis to support its determinations, and the propriety of its determinations represents a jury question. Summary judgment should be denied on this issue.

F. The School District Is Responsible For The Cost of Removing Asbestos Overspray At The Rush School

ACMAT is entitled to additional compensation from the School District of Philadelphia for removal of overspray at the Rush School. This claim arises by reason of the failure of the School District to advise ACMAT, prior to the date on which its

bid was submitted to the School District, that overspray at the Rush School was far greater than normal.

The overspray resulted from the application, out of sequence, of asbestos fireproofing above the ceiling at the Rush Middle School. Contrary to usual practice, fireproofing had been applied after ceiling grids were installed, after light fixtures were installed, after ducts were installed, and after conduit was run. See Affidavit of Henry W. Nozko, Jr., attached hereto.

A pre-bid inspection was held at the Rush Middle School. Representing ACMAT at the pre-bid inspection was Fred Dalton. A walking tour of the second floor of the Rush School did not reveal to ACMAT's representative, or to the representatives of other contractors present, the serious, pervasive overspray problem at the Rush Middle School. Because the inspection took place during the school year when students were attending class, because no one was suited-up in protective clothing and wearing respirators, because the leader of the tour (a School District representative) never mentioned the overspray problem, and because the contract documents did not address the serious overspray problem, ceilings were not removed to inspect above the ceilings. In fact, such an inspection would have exposed the inspectors, students, teachers and others within the building to a potential serious health hazard. See Affidavit of Henry Nozko, Jr.

It is therefore understandable why ACMAT depended upon the accuracy of the plans and specifications in submitting its bid, since it could not conduct an inspection above the ceiling. It was the absolute responsibility of the School District to acquaint ACMAT with any unusual conditions which might affect the amount of its bid. Overspray, to the extent found in the Rush School, was such an unusual condition.

Unlike conditions on any job that ACMAT had previously encountered, spray-on fireproofing at the Rush Middle School had been applied after the ceiling grid was installed, after the light fixtures were hung, after conduit was run, and after ducts were installed. ACMAT anticipated normal overspray but never anticipated the pervasive overspray problem it encountered at

the Rush School. The job ACMAT ultimately performed was not the job that ACMAT was asked to perform.

Certainly, the School District, during the bid stage, should have informed ACMAT that there was an extensive overspray problem. No one knew, or could have known, the job better than the School District. In fact, prior to the job's being bid by ACMAT and others, the School District conducted bulk sampling tests at the Rush Middle School. The School District had an affirmative obligation to inform ACMAT about the overspray condition, of which it had knowledge.

The only issue presented is whether the contract language bars ACMAT's claim. The School District acknowledges that the overspray was greater than anticipated but asserts, nevertheless, that ACMAT should have discovered the problem. Having failed to do so, ACMAT's claim is barred. says the School District.

Almost all bid packages for construction documents require bidders to conduct an inspection of the job site prior to submitting bids. The obvious import of this language is to place upon the contractor the risk of coping with whatever conditions might have been ascertained on a "reasonable inspection". The key word is "reasonable".

In *M. A. Mortenson Co.*, 87-1 BCA (CCH) §19,598 (1987) Mortenson contracted to construct a B-IB support facility at the Ellsworth Air Force Base in South Dakota. Mortenson's contract contained standard provisions regarding site inspection and conditions affecting the work. The bid package included drawings showing the areas wherein concrete and asphalt had to be removed in order to perform the work. Mortenson performed the site inspection as required by the bid instructions. Following the award of the contract to Mortenson, it discovered quantities of concrete far greater than it had anticipated. Mortenson advised the government that additional work would be required to perform the contract and requested an equitable adjustment for the extra work and delays. The contracting officer denied Mortenson's claim, saying that the contract site investigation provision and the drawings identified the areas wherein concrete and asphalt would have to be removed.

The Board of Contract Appeals (BCA) granted Mortenson's claim for an equitable adjustment, basing its decision on the fact that the drawings and site investigation would not have alerted it to the additional work. Mortenson established that the bid drawings did not indicate the requirement of additional concrete removal and it was impossible to determine from the drawings and site investigation that such work would ultimately be required.

Space prohibits citing each and every case which stands for the proposition that the ultimate resolution of a claim for additional compensation based on a differing site condition depends on whether or not the contractor's interpretation of the plans and inspection of the site were "reasonable". See *Minter Roofing Co.*, 87-1 BCA (CCH) 19,386 (1986), wherein the BCA denied the contracting officer's Motion for Summary Judgment because of the existence of genuine issues of fact as to the reasonableness of the contractor's interpretations of the plans and the availability of site access to ascertain whether the contract documents had been complied with. See also *Granite-Groves v. Washington Metropolitan Area Transit Authority*, 845 F.2d 330, 334 (D.C. Cir. 1988), where the court stated that in interpreting a contract, it is proper for the court to place itself into the shoes of a "reasonable and prudent" contractor and decide how such a contractor would act in the situation at hand.

There exists in this case a genuine issue of material fact. That being so, this Motion for Summary Judgment must be denied. Jurors should determine whether ACMAT was reasonable in its interpretation of the plans: whether the contract documents showed the extensive overspray; whether ACMAT's pre-bid inspection should have revealed the existence of extensive overspray; whether ACMAT had access to the area where the extensive overspray existed; whether it was reasonable to look above the ceilings; whether ACMAT would have created a health hazard to occupants of the building if it had been permitted to conduct an extensive site investigation; whether ACMAT would have exposed its employees and others to danger if an inspection was undertaken without appropriate protection; whether ACMAT had sufficient opportunity to discover the

condition; whether ACMAT was reasonable in relying on the fact that spray on fireproof is almost never performed out of sequence as it was at the Rush School; whether ACMAT was reasonable in its reliance on the plans and specifications which did not alert ACMAT to the existence of pervasive overspray; and whether the School District possessed or should have possessed superior knowledge to ACMAT as to the existence of extensive overspray. Considered individually or together, these questions raise genuine issues of fact that must be resolved by a jury.

The School District relies heavily on the contract language to support its argument that ACMAT's claim should be barred. Referring to the Rush contract, Special Conditions, SC-07, the School District argues that ACMAT had the responsibility to examine the site before bidding the project. The contractor had the responsibility of ". . . informing himself fully of all determinable existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same." It was clearly a factual issue whether the extensive overspray was "determinable" given the circumstances existing when the inspection was conducted and the "limitation of the site(s)." Beyond any doubt, a jury question exists. These issues are not determinable by a motion for summary judgment.

III. CONCLUSION

For all of the foregoing reasons, plaintiff, ACMAT Corporation, respectfully requests that the motion for Summary Judgment of the School District of Philadelphia be denied.

KORN, KLINE & KUTNER

BY: 

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1845 Walnut Street
21st Floor
Philadelphia, PA 19103
(215) 751-0500

*Attorney for Plaintiff
ACMAT Corporation*

R.A.63

AFFIDAVIT OF HENRY W. NOZKO, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,	:	CIVIL ACTION
<i>Plaintiff,</i>	:	NO. 85-7067
	:	
v.	:	
	:	
THE SCHOOL DISTRICT OF	:	
PHILADELPHIA,	:	
<i>Defendant.</i>	:	

STATE OF CONNECTICUT :
: SS. East Hartford
COUNTY OF HARTFORD :

Henry W. Nozko, Jr., being duly sworn according to law,
deposes and states as follows:

1. I am the Executive Vice President of ACMAT Corporation.

2. I am familiar with the contract between the School District of Philadelphia and ACMAT Corporation relating to the removal of asbestos from the Rush Middle School.

3. ACMAT Corporation submitted a bid to the School District of Philadelphia for the removal of asbestos at the Rush Middle School.

4. The bid was submitted after a pre-bid meeting was held by the School District of Philadelphia.

5. The pre-bid meeting was attended by Fred Dalton, a former employee of ACMAT Corporation.

6. The pre-bid meeting was held on January 24, 1984. ACMAT Corporation visited the Rush Middle School prior to submitting its bid.

7. Fred Dalton, representing ACMAT Corporation, attended the pre-bid meeting along with representatives of other asbestos removal contractors.

8. Fred Dalton took a walking tour of the Rush Middle School.

9. The walking tour included rooms on the second floor of the Rush Middle School.

10. On the date of the tour, the Rush Middle School was in use, occupied by students, teachers, and others.

11. Fred Dalton had been advised that there was asbestos above the ceilings on the second floor of the Rush Middle School.

12. During the inspection, Fred Dalton was not wearing a respirator and protective clothing, nor were any of the rooms isolated and prepared for the asbestos removal work.

13. Fred Dalton did not look above the ceilings because "friable" asbestos, located above the ceilings, could not be disturbed since it would create a potential health hazard to the inspectors and occupants of the building.

14. To fully ascertain the extent of overspray above the ceilings, one would have to perform demolition work to the building which was an activity beyond the scope of the perfunctory pre-bid walking tour.

15. A bulk sampling test, performed at the Rush Middle School prior to the date on which ACMAT submitted its bid, could not reveal the extensive overspray problem at the Rush Middle School.

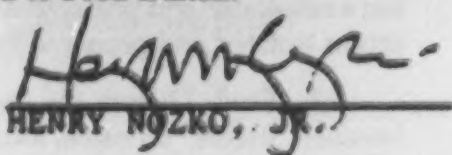
16. The contract documents, including the plans and specifications, did not disclose to ACMAT the extensive overspray problem at the Rush Middle School.

17. The School District does not deny the existence of extensive overspray, only our right to be compensated for the expense of removal of additional overspray.

18. The overspray problem at the Rush Middle School was the most extensive that ACMAT has encountered since it began asbestos removal work in 1975.

19. When the school was originally constructed the asbestos fireproofing was applied out of sequence, after installation of ceiling grids, light fixtures, ducts and conduit. This caused all of these building systems to be covered with overspray which under normal circumstances would not have occurred. This condition was not mentioned in any bid documents or revealed at any pre-bid meeting. Nor could this condition be ascertained by a pre-bid walk through.

20. The facts set forth in this Affidavit are based on my personal knowledge and on conversations with others, including but not limited to Fred Dalton.


HENRY NOZKO, JR.

Sworn to and subscribed
before me this 30th day
of August, 1988.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
<i>Defendant</i>	:	
	:	
and	:	
	:	
HUGHES URETHANE	:	
CONSTRUCTION, INC.	:	
<i>Third Party Defendant</i>	:	NO. 85-7067

CERTIFICATE OF SERVICE

I, Robert A. Korn, Esquire, hereby certify that on August 31, 1988, true and correct copies of the Answer of ACMAT Corporation to Motion for Summary Judgment of the School District of Philadelphia and the Memorandum of Law of ACMAT Corporation in opposition to the School District's Motion for Summary Judgment were served by United States Postal Service, first class, postage prepaid upon all counsel of record.

KORN, KLINE & KUTNER

BY: 

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(215) 751-0500

Attorney for Plaintiff
ACMAT Corporation

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR REARGUMENT
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ACMAT CORPORATION,

Plaintiff,

Civil Action No.
85-7067

v.

Hon. James T. Giles

SCHOOL DISTRICT OF PHILADELPHIA,
Defendant.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR REARGUMENT**

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Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,

Plaintiff,

Civil Action No.
85-7067

v.

Hon. James T. Giles

SCHOOL DISTRICT OF PHILADELPHIA,
Defendant.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S
MOTION FOR REARGUMENT

Preliminary Statement

This memorandum is submitted in support of the plaintiff's motion for reargument of the Court's order dated December 21, 1988, granting partial summary judgment to the defendant. See Exhibit "1". Permission to reargue was granted by the Court at the conference held on April 10, 1989.

A fair adjudication of this application requires an appreciation of the unique circumstances that shape the performance of work at a construction project and the myriad of special clauses that are unique to construction contracts.

It is respectfully submitted that an interpretation requiring express School Board approval to any deviation from the contract documents is improper and not in conformity with the terms of the contract or prevailing law. The claims asserted by Acmat Corporation are not precluded by statutory or contractual language that requires School Board approval. That requirement was complied with to the extent necessary.

FACTS

In or about April and June 1984, Acmat Corporation ("Acmat") and the School District of Philadelphia ("School District") entered into separate contracts for asbestos abatement at three school buildings in the City of Philadelphia. The schools were Fairhill Elementary School, Lincoln Senior High School and Rush Middle School. The Fairhill contract, dated April 16, 1984, was for a fixed price in the sum of \$446,000. In June 1984 the School District initiated a change in specifications relating to air monitoring and work practices at the Fairhill School. School Board approval was obtained for the change in work and for an increase in the contract price in the sum of \$18,000.00.

The Lincoln contract, dated June 11, 1984, was for a fixed price in the sum of \$223,000. School Board approval was obtained.

The Rush contract, dated June 11, 1984, was for a fixed price in the sum of \$595,000 and involved asbestos removal from the second floor only. Thereafter, the School District chose to remove asbestos from the first floor of the Rush School and entered into a Supplemental Agreement dated October 30, 1984, for the sum of \$656,000. Formal School Board approval was obtained for the initial agreement and the Supplemental Agreement. The School District also elected to clean certain property stored in closets and cabinets in the building. This work was not included in the original contract and the School District issued a change order with School Board approval. Although the change order in the sum of \$63,282.89 was executed by both parties, Acmat expressly reserved its right to seek additional compensation. The School District executed the change order and unilaterally deleted the language inserted by Acmat.

All of the aforementioned contracts and unilaterally initiated changes by the School District were approved by the School Board.

During the performance of its work Acmat encountered unanticipated differing site conditions that caused significant increases in the amount of work it had agreed to perform and in

the cost of performance. The record is replete with correspondence and other documentation in which the School District acknowledged the additional work Acmat encountered due to the differing site conditions. Indeed, the School District, in many instances, ordered that the additional work be performed and even attempted to amicably adjust the compensation due Acmat for this work. The site conditions simply caused an increase in the amount of work Acmat had agreed to perform. The fact that claims could arise from differing site conditions was expressly contemplated by the agreements. See paragraph 14(c) of the Rush Contract for an example.¹

Other claims involve the *amount* owed for work unilaterally ordered by the School District with School Board approval.

Another category of claims are based on work which Acmat asserts lie outside the scope of the contract. This is work that the School District ordered Acmat to perform in the mistaken belief that it was within the scope of the contract. This work was not the result of a unilateral decision of the School District to modify the scope of the contract pursuant to paragraph 14(a) of the contract, but was insisted upon by the School District in the erroneous belief that it was included in the contract. Even the most cautiously drafted construction contract will include terms and drawings which may be interpreted differently by parties to an agreement. Interpretation is often based on custom and usage in a particular trade. The claims that come within this category are the result of a simple common law breach of contract and there is no procedure in the contract for their resolution. They are compensable against the School District in accordance with the common law, as they would be against any party that breached a contract. The School District's improper administration of the contract and interference with Acmat's work also give rise to claims for breach of contract. A prime example is the unreasonable inspections and late reporting of test results that delayed Acmat and caused it to perform more work. Other

1. For ease of reference, citations to the construction contracts correspond with sections in the Rush agreement.

examples are conflicting and late directions to do work and the directions to wear full face masks and to install a third layer of polyethylene.

Another category of claims are based on the increased costs caused by owner generated disruptions and delays to the performance of the contracts. These claims were summarily dismissed by the order of December 21, 1988, on the basis of the "No Damage for Delay" clause in the parties' agreement. See paragraph 15(c) of the Rush Contract for example. However, for reasons set forth herein, the scope of these clauses has been limited by the courts and Acmat should have the opportunity to present this issue to the jury.

An additional claim is for the contract balance which has been retained by the School District in the apparent sum of \$142,090.72.

For its part, the School District has counterclaimed for liquidated damages and credits for work which was allegedly omitted or improperly performed.

Argument

POINT I

THE PROVISIONS OF THE CONSTRUCTION CONTRACTS DO NOT PRECLUDE RECOVERY OF THE CLAIMS ASSERTED BY ACMAT

The School District's interpretation of the agreement improperly merges the paragraphs of Article 14 of the General Conditions of the contract and distorts the manifested intent of the parties.

The reality of a construction project is that despite the many hours of planning by design professionals and construction experts, contingencies arise that require changes in the methods and manner of performance by the contractor. The construction contract may set forth different procedures for dealing with contingencies. The particular procedure to be utilized will usually depend on the cause of the changed work.

A. Paragraph 14(a) is a unilateral changes clause.

Paragraph 14(a) is designed to deal with changes initiated by the School District. Clauses such as these are unique to construction contracts because they allow the owner to issue unilateral orders directing a deviation from a contract that has already been assented to by the parties.² Otherwise, major construction, in which large sums of money have been committed, could come to a standstill while the parties negotiate and try to come to an agreement on a modification to their contract. This being the case, the contractors only remedy is to seek additional compensation if it believes that the adjustment allocated by the owner is insufficient. Paragraph 14(b) deals with the equitable adjustment of the contract price when changes to work have been made in accordance with paragraph 14(a). Of course, all contracts may be amended at any time by the mutual assent of the parties and the procedure therefor need not be expressed in the agreement.

School Board approval was properly obtained for the work unilaterally initiated by the School District pursuant to paragraph 14(a). Acmat became obligated to perform the work whether it wanted to or not because it was within the general scope of the contract and because paragraph 14(a) left it with no choice. However, the School District cannot unilaterally dictate the compensation to be paid for this work. Paragraph 14(b) sets forth a formula to make the adjustment but the School District cannot dictate the amount of the net costs to be used in the calculation. The final sentence of paragraph 14(b) which attempts to give the School District this right is a nullity and must be disregarded.³ Thus, the price adjustment for work ordered under paragraph 14(a) must be mutually assented to by the parties in a change order or left for the determination of the trier of fact.

Change Order No. 1 to the Rush School Contract is a case in point. The School District decided that it wanted to clean the

2. Paragraph 14(a) refers only to changes by the School District and makes no mention of assent by Acmat.

3. Discussion of this issue begins on page 23.

personal property stored in closets and cabinets. It directed Acmat to do the work pursuant to paragraph 14(a) and School Board approval was obtained. See Mattleman affidavit sworn to August 15, 1988. Although a "proceed order" could have issued at that point, the School District attempted to make an agreement with Acmat for the fixed price of \$63,282.89 and issued a change order for its signature. Acmat balked at the price and reserved its right to seek additional compensation and so stated in the change order. Thus, Acmat was asserting its right to seek an equitable adjustment under paragraph 14(b). However, the School District unilaterally crossed out Acmat's language and stated that it had the absolute right to dictate the price to be paid for the change. See Exhibit "2" annexed hereto. Thus, it is clear that there was no "meeting of the minds" as to the price for this change and Acmat proceeded with the work in accordance with paragraph 14(a) of the contract. The claimed amount for performing this work is in the sum of \$148,398.22.

Another interesting situation arose from the additional work unilaterally directed by the School District and approved by the School Board at the Fairhill School. According to the documentation annexed hereto, the Board approved the addition of a work practices supplement to the contract. See Exhibit "3". The School District and the Board had this right pursuant to paragraph 14(a) of the contract and Acmat became obligated to perform as directed. However, no change order has been produced showing Acmat's assent to a price. The documentary evidence shows only a proposal by Acmat to apply one coat of encapsulating sealer at soffits. It does not show an agreement to perform the sealer work for a fixed amount and certainly does not show an agreement to 23 pages of work practices at any price. In the final analysis, Acmat was required by paragraph 14(a) to perform in accordance with the work practices supplement, but never agreed to a price. The School District's memorandum to file appears to be simply a self-serving hearsay document which is entitled to little or no consideration. Accordingly, all of Acmat's claims arising out of performance of the work practices supplement are entitled to an equitable adjustment.

The first claim in the sum of \$18,000 is for the sealant referred to previously.

The claim involving the removal of carpet is an item to be equitably adjusted.

Other claims arising from the work practices supplement are contained in the claim designated as No. 8. It includes the work imposed on Acmat by the supplement and the breaches committed by the School District in its implementation.

B. Paragraph 14(c) is a differing site condition clause and governs the changes that were unexpectedly encountered at the Project.

The agreements contain a differing site condition clause that is designed to deal with conditions that differ from those set forth in the contract documents or which are normally found in construction. It has nothing whatsoever to do with changes within the scope of the contract which are unilaterally ordered by the School District pursuant to paragraph 14(a) or changes outside the scope of the contract which require the assent of both parties and the School Board pursuant to 24 Pa. Stat. Ann. § 5-508.

Differing site condition clauses became commonplace in government contracts during the last 25 years in order to hold down the cost of construction. Without a differing site condition clause, contractors assume the risk of unexpected costs and difficulties which can be sustained when differing site conditions are encountered. Consequently, bids were exaggerated to cover unknown contingencies which might never occur. Government entities found that they could save money on their overall expenditures for construction if they contracted for the proposed work without a mark-up for contingencies since a large number of projects were being built without encountering different conditions. Thus, there was a net savings, even though, some projects cost more because of unexpected contingencies. Consequently, the differing site condition clause allows a builder to bid a project safe in the knowledge that it will be equitably compensated if an unexpected condition arises.

It is well documented that Acmat encountered conditions on these projects which were different from what was described on the plans and specifications and different from anything else it had experienced in its long history of asbestos abatement.

The issue is whether the differing site conditions clause in paragraph 14(c) is modified by the unilateral changes clause found in paragraph 14(a). The answer was given in the negative by the Pennsylvania Supreme Court in *Teodori v. Penn Hill School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964). In *Teodori* an excavation contractor encountered a differing site condition that caused it to perform additional work and to experience a delay. The contractual language was very similar to the wording used by the School District in the case at bar. The contract contained a differing site condition clause, an extra work provision and a section for computing payment for extra work. The Court found that the differing site condition clause was separate and apart from the provisions for extra work.

The following pertinent remarks were made by the Supreme Court of Pennsylvania:

Authority next argues that the contract between the parties provided no agreement to pay for extra work in the amount claimed by Teodori. This contention is based upon the "Changes and Alterations" section of the contract, which clearly provides that such "changes and alterations" be made by written order. This argument completely ignores the section of the contract dealing with "Conditions Differing From Those Shown On Plans Or Indicated In Specifications", set forth in full above. The parties obviously contemplated the possibility of the exact type of contingency which arose, and provided for it in the contract.

We agree with the conclusion of the court below, that Teodori's right to extra compensation, if any, is governed by the "differing conditions" clause, and not by the "changes and alterations" clause, the extra compensation not being sought for "changes" and/or "alterations" as those terms were used in the contract.

Nor are we moved by Authority's argument that the award of extra compensation is contrary to the provisions of the School Code or Municipality Authorities Act. The statutory authority for Authority to award contracts is contained in the Municipality Authorities Act of 1945, as amended by the Act of May 6, 1957, P.L. 112, Sec.1, 53 P.S. §312. That act provides, in substance, that contracts for construction and repair work involving a cost in excess of \$1,000.00, shall be awarded only on the basis of competitive bids.

The contract in the instant case was entered into under circumstances which fully complied with the above statute. The extra work which the plaintiff was required to do and upon which his claim is based was a natural extension of the quantum of the work contemplated by the original contract and was clearly covered by an express provision thereof. No work not encompassed in the original contract was presented by discovery of the gasoline line, and thus no physical changes or alterations in the contract documents were necessitated thereby. The end product of the site preparation remained exactly as originally planned; only the manner of accomplishing it was affected. The contract unequivocally provided for this contingency, and the plaintiff had a clear contractual right to adjust his method of operation and to recover his additional costs within the contract framework.

Here, the contract foresaw the possibility of what actually occurred, and Teodori complied with the governing provisions of the contract. The architect investigated the conditions, found them materially different from those shown or indicated in the plans and specifications and made the necessary changes for the conduct of the work, thereby entitling Teodori to an increase in compensation in accordance with the "Extra Work" section of the contract. *Teodori v. Penn Hills School District Authority*, 196 A.2d at 309.

Thus, it is quite apparent that procedures for additional work caused by differing site conditions are independent from these governing additional work under the changes clause in paragraph 14(a). The only link between paragraphs 14(a) and 14(c) is that the cost for additional work is to be calculated in accordance with paragraph 14(b). Paragraph 14(c) specifically states that "[a]ny increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes." This is a clear reference to paragraph 14(b) since it deals with costs due to changes made under paragraph 14(a).

Accordingly, paragraphs 14(a) and 14(c) are separate and distinct from each other. Changes that are caused by differing site conditions do not require School Board approval and need not be in writing. See *Teodori v. Penn Hill School District Authority*, *supra*.

C. The site inspection clauses have no bearing on the claims asserted by Acmat.

Reliance on the site investigation clause of the contracts to nullify paragraph 14(c) is misplaced. The courts are reluctant to read such exculpatory clauses broadly and to relieve owners of their liability for changed conditions. An interpretation which shifts the risk of differing site conditions to the contractor would render paragraph 14(c) meaningless and undermine the very reasons for its insertion in the contracts. It must be remembered that differing site condition clauses were inserted by government entities to reduce the cost of construction. An interpretation which voids paragraph 14(c) on this basis would allow an owner to reduce a contractor's price and then deny an equitable adjustment if a differing site condition is found. See *Town of Longboat Key v. Carl E. Widell & Son*, 362 So.2d 719. (Fla. 2nd DCA 1978).

In *United Contractors v. U.S.*, 368 F.2d 585, 598, the court wrote the following:

But we have held, in comparable circumstances, that board exculpatory clauses (identical in effect with this one) cannot

be given their full literal reach, and 'do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.' *Fehlhaber Corp. v. United States*, 151 F.Supp. 817, 825, 138 Ct.Cl. 571, 584 (1957), cert. denied, 355 U.S.877, 78 S. Ct. 141, 2 L.Ed.2d 108. As *Fehlhaber* said, general portions of the specifications should not lightly be read to override the Changed Conditions clause. *Ibid.* It takes clear and unambiguous language to do that, for 'the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application * * *.' *Thompson Ramo Wooldridge Inc. v. United States*, 361 F.2d 222, 228, 175 Ct.Cl. —, — (1966).

In *U.S. v. Spearin*, 248 U.S. 132, 137 (1918), the Supreme Court held:

But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume the responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

Similar situations have also been reviewed by government boards of contract appeals which have special expertise in dealing with construction matters.

In *M.A. Mortenson Co.*, ASBCA No. 32918, 87-1 BCA ¶19,598 at pgs. 99,130, 99,131 (1987), the Board wrote:

We have found that the Electrical Distribution drawings, coupled with a reasonable site investigation, would not have alerted appellant to the need for concrete and asphalt removal in addition to that required and specifically delineated in the removal drawings. Accordingly, even if the Government's contention, that appellant has the obligation to carefully review the entire contract for areas of concrete removal in addition to those specifically set forth, is correct, it is simply not applicable in light of our key finding.

See also, *Farnsworth & Chambers Co., Inc. v. U.S.*, 346 F.2d 577 (Ct. Cl. 1965).

Nor is the law different in Pennsylvania. Cases cited by the School District involve situations where the owner expressly stated that contract documents were not to be relied upon by the contractor and where the contractor expressly assumed all risks from conditions at the site. The contractor was placed on notice that it had to fully analyze the conditions at the site.

The 1955 contract at issue in *Montgomery v. City of Philadelphia*, 391 Pa. 607, 139 A.2d 347 (1958), did not contain a differing site condition clause. Moreover, the agreement expressly eliminated certain tests from being a part of the agreement and stipulated that the contractor assume the risk resulting from differing site conditions. The contract even included a *caveat emptor* type provision that "the contractor shall accept the site as he finds it".

Likewise, it seems that the contract at issue in *Nether Providence Township School Authority v. Thomas A. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), did not contain a differing site condition clause. It too placed full responsibility for knowing the conditions of the site on the contractor.⁴

4. "A. It is the responsibility of, and it is hereby agreed that the contractor has, prior to signing of this contract, by following, or such other methods as he may desire to take, namely, by careful personal study of the contract, the plans, specifications, and all other documents and data pertaining to the project and by an examination of the site of the work, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality, and quantity of the materials which will be required, the character of

Such is not the case in the matter at bar. The agreements refer to and incorporate the drawings and specifications for the project. Although the agreements contain two site inspection clauses they are vague and unspecific. They certainly do not shift the risk of conditions at the site to the contractor. Indeed, there is no indication that the site investigation clauses were intended for this purpose.

The first inspection clause is contained in paragraph 7 of the General Conditions and states the following:

7. CONDITIONS AFFECTING THE WORK

- (a) The Contractor shall be responsible for ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the School District. The School District assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the receipt and opening of bids other than by a bulletin or addendum that is duly issued.

The second site inspection clause is contained on page SC-02 of the Special Conditions and reads as follows:

equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and of all other matters which can in any way affect the work under this Contract.

No oral Agreement or conversation with any officer, agent or employee of the owner, school district, architect, or consultant, either before or after the execution of this contract, shall affect or modify any of the terms or obligations herein contained. Failure to comply with any or all of the above requirements will not relieve the contractor from the responsibility of properly estimating the difficulty or costs of successful completion of the work nor from the responsibility for the faithful performance of the provisions of this contract." *Necher Providence Township School Authority*, 476 A.2d at 906.

SC-07 EXAMINATION OF THE SITE

The contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully on all determinable, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same.

Apart from the ambiguity created by having two site inspection provisions in different parts of the agreement, it is clear that the clauses read alone or together do not require the type of exhaustive site inspection that the School District now wishes to retroactively impose. Essentially the two clauses require the type of inspection in which a prospective bidder visually ascertains the physical limitations of the project. They do not require penetrations into the walls and ceilings. The latter clause is significant in using the words "determinable, existing conditions". Obviously, the clauses were intended to be compatible with the differing site condition clause referred to earlier. Simply put, the site investigation clauses do not shift responsibility to the contractor to learn of every hidden condition that may be lurking behind the walls and ceilings of the building. This is especially the case where the contractor is relying on a contractual provision to compensate it for unknown conditions. This interpretation is even more compelling in the situation at bar where the conditions exist in a fully constructed building. This is not a case where the ground is readily available to an excavation contractor to do whatever tests it may wish to perform. In this instance, it seems that a full investigation would have required demolition of existing structures. There can be no serious doubt that the School District would have forbidden such an inspection.

It is respectfully submitted that Acmat must be judged by what a reasonable contractor experienced in the field of asbestos abatement would have done and that is a question for the trier of fact. See *Stock & Grove, Inc. v. U.S.*, 493 F. 2d 629 (Cl.Ct. 1974). Interestingly, page 1010-1 of the specifications to the Rush contract summarizes the work to be performed and

indicates that it is above the ceiling line and only in the areas located on the drawings furnished by the School District.

DIVISION I – GENERAL REQUIREMENTS

1.01 SUMMARY OF THE WORK

A. Contractor shall supply all labor, materials, services and equipment required to remove and discard all existing acoustic ceiling tile panels *from the areas above which* the structural steel beams, bar joints, metal form decking, and all other surfaces are covered with asbestos containing fireproofing materials *as located on the accompanying drawings*. Emphasis supplied.

The fact that the School District was placed on notice of the differing site conditions and other situations that arose is evidenced by the volumes of correspondence that passed between Acmat and the School District. In most instances the School District acknowledged that the work had to be performed and there were even times when attempts were made to reach an amicable resolution of the costs involved in performing the additional work. Indeed, the record shows that inspectors and other School District employees and consultants were frequently at the site and aware of all conditions as they were discovered. Verbal instructions which may have been given with regard to differing site conditions were entirely appropriate since they would deal with matters which were clearly contemplated by the contract documents, in particular, paragraph 14(c).

While the cause of certain claims or parts of claims may be designated to one or more categories, the following involve differing site conditions:

<i>Rush</i>	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 20, 23, 24, 25, 26, 28, and 29.
<i>Lincoln</i>	3
<i>Fairhill</i>	2, 3 and 10

It is respectfully submitted that the question of whether the aforementioned work constitutes a differing site condition is a

question of fact for the jury. They must determine whether a reasonable contractor under these circumstances would have foreseen the changed conditions experienced by Acmat.

Another interesting aspect of this item of damages is the supplemental agreement adding the first floor to the Rush School. Since the proposed work was outside the scope of the original contract, a new agreement and approval of the School Board was required to satisfy the requirements of 24 Pa. Stat. Ann. §5-508. However, an examination of the documentation surrounding this transaction and the affidavit of Henry Nozko, Jr., sworn to on June 6, 1989, helps to clarify and define the Supplemental Agreement. The July 3, 1984 letter, which is incorporated into the agreement, sets forth the sum of \$595,000 for those conditions which are the *same* as those on the second floor and the further sum of \$61,019 for additional items on the first floor which were *found* to exist at that time.

Robert F. Sullivan's memorandum to the file dated July 3, 1984, explains that the gym, auditorium and kitchen areas had been identified on that date as different and they were approached as *major added* costs and assigned a price. The price was not, therefore, the total cost for the first floor. Any other conditions at the site that differed from the second floor were to be treated as differing site conditions under paragraph 14(c). The memorandum states that the differing site work would be performed at the same rates as the second floor and explained that the premise for this approach was that Acmat's work should extend to the first floor on a prorata basis.

The following pertinent language appears in the July 3, 1984 memorandum:

An initial cost breakdown for the first floor was submitted amounting to \$780,000. This was subsequently negotiated to \$595,000.00 based on the School District's position that the area to have the asbestos removed was the same on both floors.

After a detailed review of the plans for the building and a visit to the school, another meeting was held on June 27th to negotiate differences between the two floors of the

building *that had been identified*, such as the gym, auditorium and kitchen areas. Attending the meeting were Henry Nozko, Sr., Henry Nozko, Jr. of Acmat Corp. and Messrs. Sullivan, Krupinsky, Glenn and Dr. Guth, consultant. *Agreement was reached that Acmat Corp. would perform the work utilizing the same rates in pricing the first floor as was applied to their Contract B-216 for the second floor. The premise for this approach is that Acmat Corp. is the low qualified contractor to receive the Board award and should logically extend their work to the first floor on a prorata basis.*

The base price for the first floor was set at \$595,000.00 to which additional requirements were added as outlined below.

The major added costs are:

1. Asbestos removal from beams in gymnasium	\$30,000.00
2. Cost for removal and replacement of metal pan ceiling in kitchen	20,000.00
3. Removal of asbestos from boiler room	11,000.00
	<hr/>
	\$61,000.00
Base Price	595,000.00
Total price for first floor	<hr/>
	656,000.00

Emphasis supplied.

The intent of the contract is further explained in the School District's letter of November 21, 1984, signed by Dr. Bernard Rafferty and Eugene F. Brazil.

The second floor of the building was used as the model for comparison to the first floor in negotiations between the School District and ACMAT. To the extent that there is a substantial difference in the quantity of asbestos to be removed or in the nature of the asbestos to be removed, we agreed that an extra or a credit would be given depending upon whether the quantity of the work was greater or lesser or the nature of the asbestos differed.

Thus, the parties anticipated that different conditions than those identified could be encountered on the first floor of the Rush School and would result in an appropriate adjustment in price. They were uncertain as to what conditions existed and in effect agreed that they should be treated as differing site conditions pursuant to paragraph 14(c). If nothing else, a question of fact exists over the parties' intent in entering into the Supplemental Agreement. For the reasons discussed previously and on the basis of the foregoing argument, the site inspection clauses have no impact on the work performed on the first floor of the Rush School.

D. The provision making the School District the final arbitrator of costs is null and void.

The final sentence of paragraph 14(b) which attempts to make the School District the final arbitrator as to net costs is void as against public policy. Initially, it is noted that there is an ambiguity as to whether the language refers to both increases and decreases in the contract price. The language appears in the sentence that concludes the terms dealing with decreases in compensation. It is submitted that it does not impact on increases in cost.

Perhaps more significant is the fact that language which leaves a decision of this matter in the hands of one of the parties to a contract is void as a matter of public policy.

In *Abramovich v. Pennsylvania Liquor Control Board*, 490 Pa. 290, 416 A.2d 474 (1980), the Court reviewed a situation where an individual who acted as legal counsel to the Pennsylvania Liquor Control Board also acted as an arbitrator in a proceeding involving the Board. The Court reversed the Commonwealth Court's order affirming the award made by this individual and stated:

In an arbitration proceeding a party is entitled to a 'full and fair' hearing. *Smaligo v. Fireman's Fire Insurance Co.*, 432 Pa. 133, 247 A.2d 577 (1968). As this Court has previously held, procedural due process requires that a fair hearing be

conducted by one not involved with a party to the proceeding. See *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1976) (unconstitutional commingling of investigative and adjudicative functions where Commissioner of State Police had sole discretion to investigate and determine guilt of state trooper). *Abramovich v. Pa. Liquor Control Board*, 416 A.2d at 474-475.

In *John F. Harkins Co., Inc. v. School District of Philadelphia*, 460 A.2d 260 (Sup. Ct. 1983), the plaintiff was seeking an equitable adjustment in addition to the amount already paid by the School District on account of work that it was directed to perform. The same language with regard to the finality of School District decisions did not preclude the contractor from offering proof of additional damages.

Our independent review of the record persuades us that this was error. In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor. John F. Harkin, supra at page 265. Emphasis supplied.*

The adverse decision in *Harkins*, supra, was due to the plaintiff's failure to satisfy its burden of proof and not because of any contractual bar to its being able to offer evidence on the issue of damages. Accordingly, it is submitted that while the Court properly found the School District responsible for certain equitable adjustments, it incorrectly adopted the amount allocated by the School District. Likewise, the failure of the School District to allocate any amount to other claims should not have been a bar to consideration by a jury.

Simply put, the School District cannot be the final and conclusive arbitrator over its own disputes. The Court's finding to the contrary should be withdrawn to permit the trier of fact to determine the issue.

POINT 11

**THE CLAIMS FOR BREACH OF CONTRACT ARE
ENTITLED TO ADJUDICATION AS PROVIDED
BY THE COMMON LAW**

Until this point, the argument has concerned itself primarily with the operation of the contract over claims that are entitled to equitable adjustment as defined by the agreement. The argument now addresses those claims made for common law breach of contract.

- A. Acmat is entitled to damages for work performed beyond the scope of the contract, but which are claimed by the School District to be included in the agreement.**

It is not unusual for parties to a construction contract to disagree over whether certain work directed by an owner is included or excluded from the scope of the contract. After all, the contract documents, which include a form of agreement, general conditions, specifications and drawings, are often subject to interpretation during the pendency of a project. A claim arises when the parties cannot agree to whether work is included in the scope of their contract. When this situation arises, a contractor will often do the work under protest and assert a claim. *Williston on Contracts*, Vol. 3, rev. ed. §704, at page 2027; *Shalman v. Board of Ed. of Central Sch. Dist. No. 1*, 31 A.D.2d 338, 297 N.Y.S.2d 1000, 1003 (3rd Dept. 1969).

Protest work is not a claim for extra work per se, but a claim for breach of contract. Therefore, it would be inappropriate to impose a requirement that School Board approval be obtained prior to suit on these claims. Such approval would never be forthcoming and it would be analogous to asking a breaching party to a contract for permission to sue. Claims which are based on disagreement over scope include the following:

<i>Rush</i>	2, 12, 14, 21, 22, 23, 24, 31
<i>Lincoln</i>	1, 6, 7, 9 and 10
<i>Fairhill</i>	2, 3, 5, 8 and 9

Another aspect of the breach of contract claim deals with the manner in which the School District managed the contract. The School District unreasonably interfered with construction by failing to heat the premises, allowing the elevator to stop functioning, conducting improper inspections and reinspections, conducting late inspections and issuing defective plans and specifications. The School District's interference with Acmat's work is well documented. It is clear that an owner may not impede the progress of a contractor. Yet that is precisely what the School District did when it ordered the cleaning of closets and rails at the Rush School after the area was fully cleaned. As a consequence, the entire floor became recontaminated and had to be recleaned at great additional expense and time. The failure to heat the building caused flooding and additional cleaning. School personnel contaminated restricted areas by entering them without taking appropriate precautions. Upon information and belief, a work stoppage was ordered at the Lincoln School and there were late test reports and delayed responses when directions were requested.

Clearly, the School District impeded progress and interfered with the planned sequence of work at the project. It is submitted that this entitles Acmat to just compensation for breach of contract. See *Lester N. Johnson Co. v. Spokane*, 22 Wash. App. 265, 588 P.2d 1214 (Wash. App. 1978).

Perhaps most egregious was the arbitrary and capricious way in which the School District conducted its inspections. While the agreements provided for inspections it is alleged that they were conducted in an unreasonable manner. Initially, it is noted that the specifications were defective. The requirement of many air exchanges a day while at the same time requiring dust free surfaces was impossible to comply with in the City of Philadelphia. The fumes, dirt and dust carried into the building by the air exchanges made an absolute dust free environment impossible. The Government warrants that its plans and specifications are free of defects and, therefore, a contractor is entitled to be compensated for the extra costs incurred in trying to comply with them. *U.S. v. Spearin*, 248 U.S. 132, 39 S.Ct.

59, 63 L.Ed. 166 (1918); *Dept. of Natural Resources and Conservation of the State of Montana v. U.S.*, 1 Cl.Ct. 727 (Cl.Ct. 1983).

Even if it could be claimed that the specifications were not defective, the implementation of the specifications were improper. The episode involving the snapping of a map thereby creating dust stands out as an example, as does the delay in conducting inspections and in reporting their results to Acmat. Limitations on government inspections generally fall into four categories: (1) unreasonable delay, (2) inadequate tests, (3) changing contract requirements and (4) interference with performance. See Briefing Papers, *The Inspection Clause*, The Government Contractor, No. 88-10, September 1988, annexed as Exhibit "4"; *Texas v. Buckner Construction Co.*, 704 S.W.2d 837 (Tex. App. 14 Dist. 1985), and *Adams v. U.S.* 358 F.2d 986. (Ct. Cl. 1966).

Accordingly, all of the additional work associated with the excessive inspections are compensable and are entitled to be submitted to a jury.

POINT III

THE CONTRACT DOES NOT PRECLUDE ACMAT'S CLAIM FOR DAMAGES DUE TO DELAY

Another exculpatory provision relied on by the School District is the one dealing with delays.⁵ Clauses such as these are not taken literally and exceptions have been created in order to implement their true purpose.

5. If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor, fires, floods, epidemics, quarantine restrictions, strikes, or freight embargoes, the period hereinabove specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall not be entitled to any damages or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.

Notwithstanding a "no damages for delay" clause, parties have been able to recover delay costs in four situations: (1) when the delay was not of a kind contemplated by the parties; (2) when the length of the delay was unreasonable; (3) when there was evidence of bad faith; and (4) when the delay was caused by active interference.

The rationale for this is the implied obligation of the owner to refrain from interfering with a contractor's work, especially where it has sought to insulate itself from liability for delay with a "no damage for delay" clause.

In Pennsylvania this principle was recently addressed by the Supreme Court in *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862, 865, 866 (1986):

The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work. *Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*, 409 Pa. 465, 187 A.2d 157 (1963); See *Commonwealth of Pennsylvania State Highway and Bridge Authority v. General Asphalt Paving Company*, 46 Pa.Cmwlth. 114, 405 A.2d 1138 (1979) (in spite of contract provisions excluding claims for additional compensation due to delay caused by the owner, contractor awarded additional compensation for three month delay caused by Commonwealth's direct interference in failing to have a water main expeditiously relocated), and *Commonwealth of Pennsylvania, Department of Highways v. S.J. Groves and Sons Co.*, 20 Pa.Cmwlth. 526, 343 A.2d 72 (1975) (exculpatory provisions of contract held not to prevent recovery by contractor of increased costs in performing due to a fourteen week delay while AT & T relocated a coaxial conduit). "[W]here an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the

detriment of the contractor, [the owner] will be liable for damages resulting therefrom." *Henry Sherk Company v. Erie County*, 319 Pa. 100, 178 A.662 (1935).

Gasparini, supra is particularly interesting because the Court allowed damages for delay because of a failure on the part of the defendant to properly coordinate construction activities at the site.

It is submitted that the facts underlying Acmat's claim for delay show an entitlement to damages and it should be afforded the opportunity to present such claims to the jury.

Delays caused by unanticipated changes at the job site are certainly compensable. In addition, the School District's breaches, including unreasonable inspection requirements and delays in inspection all impacted on the progress of the job. It constituted an active interference. Other examples are the loss of elevator service and loss of efficiency because of a failure to heat the building during the winter season.

Indeed, the policy that prohibits an owner from interfering with a contractor's work is so strong that a clause absolving the owner from responsibility for delays due to its negligence will rarely be upheld.

In *Ozark Dam Constructors v. U.S.*, 127 F.Supp. 187, 190, 191, (Ct.Cl. 1955), the Court wrote:

A contract for immunity from the harmful consequences of one's own negligence always presents a serious question of public policy. That question seems to us to be particularly serious when, as in to his case, if the Government got such an immunity, it bought it by requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine. If it does, by such a provision in the contract, get the coveted privilege, it will win an occasional battle, but lose the war.

We do not say that a provision for non-liability such as was inserted in the instant contract may not be effective with

regard to some kinds or degrees of negligence. We do say that the Government's position that the provision must be taken literally, so that the Government is not liable to the consequences of any conduct whatever of its representatives, is wrong.

* * *

Our conclusion is that the non-liability provision in the contract, when fairly interpreted in the light of public policy, and of the rational intention of the parties, did not provide for immunity from liability in circumstances such as are recited in the plaintiffs petition.

Surely, such acts as the School District's failure to heat the Rush School, to allow pipes to burst and flood the building constitute the types of conduct, negligence and inconsideration that are compensable.

Accordingly, the School District cannot exculpate itself from liability for delays under the circumstances of this case.

POINT IV

THE PROVISION OF THE SCHOOL CODE REQUIRING SCHOOL BOARD APPROVAL HAS NO BEARING ON THE CLAIMS ASSERTED

The Supreme Court in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306, made it clear that claims of the type asserted herein are not barred by the failure to have School Board approval. The work giving rise to many of the claims was expressly covered by the differing site condition clause of the agreement. The breach of contract claims involve a failure on the part of the School District to live up to its end of the bargain and are compensable on common law principles. Other claims involve the amount to be paid for work properly approved by the School Board. The contract provides for an equitable adjustment in such instances and the School District may not dictate the amount to be paid to the contractor.

POINT V

**THE CLAIMS FOR QUANTUM MERUIT
SHOULD BE REINSTATED**

In *Derry Township School District v. Suburban Roofing Co., Inc.*, 517 A.2d 225 (Pa. Cmwlth. 1986), the Court recognized that quantum meruit was an appropriate theory for claims that did not require School Board approval.

The Court wrote in pertinent part:

The District misrepresents the Contractor's claim which is not for compensation for extra work performed under changes to the contract, rather, the Contractor is asserting a claim for its reasonable costs incurred in reliance upon the District's interpretation of the Contractor's performance under the terms of the contract, which interpretation the District later altered to the Contractor's detriment. This is a proper case for equitable estoppel. In *Department of Environmental Resources v. Dixon Contracting Co., Inc.*, 80 Pa. Commonwealth Ct. 438, 471 A.2d 934 (1984), we held that equitable estoppel can be applied to a governmental agency to preclude that agency from depriving a person of a reasonable expectation when such agency knew or should have known that such person would rely upon the representation of the agency. *Id.* at 443, 471 A.2d at 936-937; see also, *De Frank v. County of Greene*, 50 Pa. Commonwealth Ct. 30, 412 A2d 663 (1980).

We also distinguish this case from the circumstances in *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), upon which the District heavily relies. In *Nether Providence*, our Supreme Court held that public bodies cannot waive written authorization requirements in public contracts even if the waivers are in writing. There, the contractor sought to be compensated for extra work performed under a change order not approved by the school board as required under the terms of the contract. The

Contractor here is not claiming increased costs due to extra work incurred by the District's oral changes to the contract, rather the Contractor is claiming compensation for costs which it reasonably incurred in reliance upon the District's interpretation of its performance under the contract. *Derry Township School District*, supra at page 229.

Thus, quantum meruit stands as a separate basis for recovery of those claims based upon the scope of work and those acts alleged to be a breach of contract.

POINT VI

AN INTERPRETATION OF THE CONTRACT IN THE FOREGOING MANNER PRECLUDES SUMMARY JUDGMENT DISMISSAL OF THE COMPLAINT

It is submitted that an interpretation of the contracts in the foregoing manner is the only one which is logical in the context of the construction performed by Acmat. The provisions of the contract simply do not preclude the maintenance of this action and judgment dismissing the great majority of the claims and allocating an amount for other claims was clearly inappropriate. Genuine issues of material fact exist and are entitled to be heard by the trier of fact.

In *Schulman v. Continental Bank*, 513 F.Supp. 979, 983 (E.D. Pa. 1981), the Court reiterated the guiding principles in considering motions for summary judgment:

I turn now to an analysis of the issues raised by the instant motion. The standards governing a motion for summary judgment are well settled; however, a few observations about those principles bear repeating here. Under Rule 56(c) of the Federal Rules of Civil Procedures, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party carries the initial burden of establishing that there is no

genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970), and all inferences from the evidence must be drawn in favor of the party opposing the motion. *Small v. Seldows Stationery*, 617 F.2d 992, 994 (3d Cir. 1980). Further, summary judgment is not appropriate if there is 'the slightest doubt' concerning the material facts. *Tomaszewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974).

It is submitted that summary judgment is a drastic remedy and should be granted with caution so that a litigant will not be deprived of its day in Court.

Contractual language is often subject to more than one interpretation. The papers in opposition to the School District's motion for summary judgment and the papers submitted on reargument show this to be the case. It is submitted that certain factual determinations by a jury are necessary before a ruling can be made on the law.

In *Minter Roofing Co., Inc.* ASBCA Nos. 293387, 29897 and 31137, 87-1 BCA ¶ 10,386, the Board denied a motion for summary judgment where interpretation of a pre-bid inspection clause and a differing site condition clause required the factual determination of how a reasonable contractor would have conducted itself under the circumstances. The interpretation of the contractual provisions urged by Aemat make it clear that the School District has failed to satisfy its burden of proof that summary judgment can be granted as a matter of law.

R.A.97

CONCLUSION

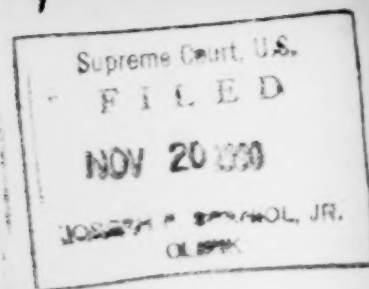
Based upon the foregoing, it is respectfully requested that the Court withdraw its prior order granting partial summary judgment to the defendant and issue a new order denying the motion, except for the findings of School District liability previously made by the Court.

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(3)
Petition No. 90-499
Cross-Petition No. 90-680



In The
Supreme Court of the United States

October Term, 1990

ACMAT CORPORATION,
Petitioner/Cross-Respondent,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
Respondent/Cross-Petitioner

**CROSS-RESPONDENT'S BRIEF IN RESPONSE
TO CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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Petition No. 90-499

Cross-Petition No. 90-680

In The

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October Term, 1990

ACMAT CORPORATION,

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SCHOOL DISTRICT OF PHILADELPHIA,

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**CROSS-RESPONDENT'S BRIEF IN RESPONSE
TO CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

OPINIONS BELOW

The per curiam judgment order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the district court, is officially reported as *Acmat Corporation v.*

School District of Philadelphia, 904 F.2d 693 (3rd Cir. 1990) and appears in Appendix ("App.") A at 1a-2a.¹ The decision of the United States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in App. B at 3a-4a. The opinion and order of the United States District Court for the Eastern District of Pennsylvania, deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in App. C at 5a-24a. The district court's decision on Acmat's motion for reargument of the summary judgment motion was issued in open court, not officially reported, is printed in App. D at 51a-53a.

COUNTER-STATEMENT OF THE CASE

The Cross-Petition for a Writ of Certiorari highlights the importance of the issues raised in Acmat's Petition and emphasizes the need to grant both the Petition and Cross-Petition. The issue raised by the School District is whether the district court's order granting partial summary judgment, *sua sponte*, to Acmat² on a small number of claims, is contrary to state statutory law and the contract between the parties. Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, seeks review of the entire judgment, including the decision denying Acmat a full and fair hearing on all of its claims by dismissing the great majority of Acmat's claims on the School District's motion for summary judgment, determining, *sua sponte*, the amount of damages to be awarded Acmat on

¹ Appendices A through J are attached to Acmat's Petition for a Writ of Certiorari, bearing No. 90-499. Appendices K through M are attached to Acmat's Reply Brief. Appendix N is attached hereto.

² Acmat's corporate parent, subsidiaries and affiliates are: Amins, Inc. Geremia Electric Co., Acmat of Texas, Inc., Acstar Holdings, Inc., United Coasts Corp., Acstar Insurance Co. and United Coastal Insurance Co.

summary judgment on a small number of claims and the failure to give Acmat a full and fair hearing on its claim for contract retainage. Acmat's Petition does not challenge the finding of liability against the School District on those few items where entitlement was found.

A. Statement of Facts

In or about April and June 1984, Acmat and the School District entered into separate contracts for asbestos abatement in three school buildings in the City of Philadelphia. All of the contracts were duly approved by the Board of Education of the School District of Philadelphia ("School Board").

Almost from the start, Acmat encountered conditions that differed materially from those shown on the plans and specifications for the projects and differed from those it observed in pre-bid inspections. Moreover, the School District breached the contracts in many respects. The School District unreasonably interfered with construction by permitting the premises to flood, conducting improper and late inspections, issuing defective plans and specifications and ordering work that caused disruptions. Other breaches involved a dispute over the scope of work required by the contracts. The foregoing resulted in enormous delays and the loss of millions of dollars by Acmat.

The contract provisions provide a mechanism for compensating the contractor for work unilaterally ordered by the School District and for differing site conditions. Parenthetically, the provision dealing with compensation for differing site conditions received School Board approval with the initial approval of the contracts and there is no additional approval required under the agreements for compensation on account of such conditions. Other claims, including those for breach of contract, were to be redressed in accordance with the common law. Most of the disputed work

performed by Acmat was authorized in writing or was verbally approved. This was well documented in the record and was admitted by counsel for the School District. App. N at 1a-5a.

B. Prior Proceedings

This action was commenced in 1985 with the filing of a complaint in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity of citizenship. The complaint seeks damages for, *inter alia*, breach of contract, delays, differing site conditions and pleads a cause of action in quantum meruit.

In 1986 the district court directed Acmat to file a Statement of Claim. The School District filed a lengthy response acknowledging that additional work had been performed and assigning an amount therefor.

In 1988 the School District moved for summary judgment. Each of the parties was directed by the district court to file their statement with respect to those items of work authorized by the School District. The School District acknowledged that it authorized the performance of some work. The district court (Giles, J.) by order dated December 21, 1988, granted partial summary judgment to the School District. App. C at 5a-24a. The district court dismissed the claims for differing site conditions because of its erroneous determination that additional School Board approval was required for each such claim despite the School Board's initial approval of the contracts with a differing site condition clause by the School Board. Similarly, the claims for breach of contract were summarily dismissed on the grounds that there was no School Board approval for the additional labor and concomitant costs for work made more difficult and expensive by School District breaches.

The district court, *sua sponte*, found the School District liable to Acmat on a few claims because of the School District's acknowledgment of their validity. However, the district court, relying on certain contract language, restricted compensation for these claims primarily to that amount unilaterally determined by the School District, and further held that "... the claims for time and material costs are not subject to judicial review." App. C at 9a.

The School District's counterclaims and Acmat's sole remaining claim for contract retainages were tried to a jury and culminated in an Amended Final Judgment dated October 24, 1989. App. F at 97a-98a. However, after trial, but before the Amended Final Judgment was entered, the district court entertained argument and thereafter reduced the amount previously awarded Acmat because the School District's expert re-evaluated the amounts it would have allowed Acmat. App. G at 99a-128a.

Acmat's appeal and the School District's cross-appeal were argued before the United States Court of Appeals for the Third Circuit. A Per Curiam Judgment Order, without any discussion of the case, affirming the judgment of the District Court is dated May 23, 1990. *Acmat Corporation v. School District of Philadelphia*, 904F.2d 693 (3rd Cir. 1990). App. A at 1a-2a. Acmat's Petition for Rehearing was denied by decision dated June 22, 1990. App. B at 3a-4a.

Acmat's Petition for a Writ of Certiorari was docketed in this Court in September 1990, and bears No. 90-499.

I. THE CROSS-PETITION REINFORCES THE IMPORTANCE OF GRANTING CERTIORARI TO REVIEW THE JUDGMENT OF THE LOWER COURT

Acmat acknowledges the significance of the issues raised in the School District's Cross-Petition and submits that it substantiates the

importance of granting review to both Acmat and the School District. An analysis of the lower court's decision on the School District's motion for summary judgment shows an inconsistent approach to the issues. The district court, on the one hand, dismissed the major part of Acmat's claim on the incorrect conclusion that it was based solely on "extra work" that was not approved by the School Board and, on the other hand, granted partial summary judgment to Acmat on a small number of so-called "extra work" items that also did not receive School Board approval. Although the great majority of Acmat's claims were not based on "extra work" or were differing site condition claims whose compensation was already approved in the contracts, the district court deprived Acmat of showing this to be the case by dismissing most of its case on summary judgment.

Accordingly, both Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, and the School District's Cross-Petition should be granted to correct an illogical and inconsistent result that will have a far reaching negative effect on the construction industry. The School District takes the inconsistent position that it is entitled to certiorari, but that Acmat is not so entitled. The fact is that both parties seek certiorari because of the inconsistent decision of the district court that both granted and denied summary judgment on matters that were required to go to trial. The mere fact that the School District has sought certiorari lends support to Acmat's petition.

II. THE PARTIES SHOULD BE PERMITTED TO PROCEED TO TRIAL TO ADJUDICATE ACMAT'S CLAIMS

A. Acmat's claims do not involve "extra work" and are compensable without School Board approval.

Although the Petition and Cross-Petition show the importance of granting certiorari to review the judgment of the lower court,³ the School District erroneously suggests that reversal will result in dismissal of all of Acmat's claims. To the contrary, Acmat has demonstrated and will show if given the opportunity, that its claims are of the type that do not require School Board approval.

The district court even indicated at oral argument that it would have the power under *Derry Township School District v. Suburban Roofing Co., Inc.* 102 Pa. Commw. Ct. 54, 517 A.2d 225 (1986), to find the School District liable. Moreover, the Pennsylvania courts recognize that claims for differing site conditions [*Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964)], delay damages [*Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A.2d 862 (1986)] and breach of contract [*Brinton v. School District of Shenango Township*, 81 Pa. Superior Ct. 450 (1923)], are separate and distinct from claims for extra work and are entitled to compensation even when claims for extra work are disallowed.⁴

³ Acmat seeks review of the entire judgment, including the adjudication of the School District's counterclaim.

⁴ Reliance by the School District on *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), is misplaced. The contract in *Durkin*, unlike the Acmat contracts, did not contain a differing site condition provision and its requirements for inspection were far more comprehensive than the inspection required of Acmat. Nor does *Durkin* have any bearing on Acmat's claims for breach of contract, delays and

Indeed, the School District acknowledged that much of the work that the district court awarded damages on would be compensable, except for its erroneous belief that School Board approval was required. See App. N at 1a-5a. Evidence of the School District's acknowledgment that additional work was performed can also be found in the School District's 1988 response to Acmat's Statement of Claim.

Accordingly, there is good and sufficient reason for this court to grant both the Petition and Cross-Petition in order to review the entire judgment of the lower court. Otherwise, the bad precedent set by this case shall have a deleterious impact on the entire construction industry doing business with the Commonwealth of Pennsylvania and its political subdivisions.

(fnt. 4 cont'd) quantum meruit recovery. In short, neither *Durkin* or the School Code has any application to the claims asserted by Acmat in the case at bar.

CONCLUSION

For these reasons, it is respectfully requested that the Petition and Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 15, 1990

APPENDIX



1a

**APPENDIX N—EXCERPTS FROM TRANSCRIPT OF
ARGUMENT ON MOTIONS FOR SUMMARY
JUDGMENT ON OCTOBER 31, 1988**

In The

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT

Plaintiff,

vs.

**PHILADELPHIA SCHOOL DISTRICT,
et al.**

Defendant.

**Philadelphia, PA
October 31, 1988
9:05 a.m.**

CA No. 85-7067

**TRANSCRIPT OF HEARING BEFORE THE HONORABLE
JAMES T. GILES UNITED STATES DISTRICT JUDGE**

Appendix N

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(Proceedings recorded by electronic sound recording,
transcript produced by transcription service.)

* * *

MR. DENNIS: If the School Board responds in a formal way
to these claims, ACMAT's next intention is going to be that the
School Board or the School District is not the final arbiter. That in

Appendix N

some way that response is unreasonable and we're going to be right back in Court again with respect to the value of those claims. Indeed, it will argue at that point that there has been ratification with respect to the work. The question now only amounts to how much should ACMAT receive.

THE COURT: Well, I'm not concerned about the School Board action which ostensibly approved part of the ACMAT claim and disapproved part of it. That's not my concern. My concern is, any category of work that the School District agreed or represented it was going to pass on to the School Board for approval as extra work, but didn't for some reason. With respect to the Rush School and the other school, where there were partial approvals — approvals are part of the plan. One can infer the School District considered the entire claim and determined that only 'x' amount fairly represented extra work.

But if the School District has failed to pass on to the School Board a proposed change order or extra work order, isn't there a dispute as to what action the School Board would take on that which the School District had promised the contractor it would pass on at least for post work ratification?

MR. DENNIS: Your Honor? First, with respect to the authorizations or promises. Some are in writing. Some are oral. With further respect to that, Your Honor, even though these two were passed on and processed — the \$18,000 and the \$63,000 proposals — ACMAT is still unsatisfied. If I may, Your Honor. Also there are some that do not even merit being passed on. For example, the overspray point. Your Honor properly pointed out that there is a question of whether that's within the contract.

Appendix N

THE COURT: The School District never represented, did it, that the overspray was an extra item?

MR. DENNIS: Not to my knowledge, Your Honor.

THE COURT: Okay. So, I'm only talking about that which the School District, in writing, said to the contractor, this is extra work. It's to be treated as extra work for purposes of the basic contract. Okay? We're going to pass this on to the School Board for approval to do the formal documentation, but we're requesting you, Contractor, in the meantime to go on with the work. Rely upon us to get approval from the School Board. Okay? And then the School District fails to pass on to the School Board for its post work ratification this category of work. Now, ACMAT says that there is such and I'm not sure what the School District position is. Is there any work that falls into that category?

MR. DENNIS: Yes, there is, Your Honor.

THE COURT: Well, what's the reason for the School District never passing on to the School Board for its post work ratification that which it agreed to pass on?

MR. DENNIS: There were delays occasioned by insufficient documentation. There were delays occasioned by the lack of personnel to process the change orders. And then, we were in litigation. And once litigation happened, according to the School District, there was really no need to proceed with that process because ACMAT had asserted a civil claim.

THE COURT: Well, you filed a motion for summary judgment. You made these assertions as to why certain claims were not passed on to the School Board. Not claims, but the addenda,

Appendix N

were not passed on to the School Board for approval of this school. And you rely on the *Deery* case for the proposition that the contractor had proceeded at his own risk.

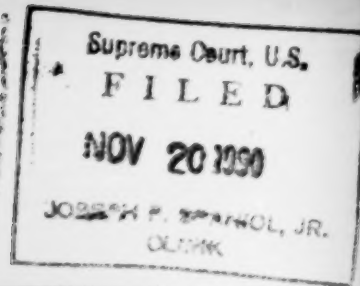
MR. DENNIS: Yes, sir.

THE COURT: This Court might have the power, even under *Deery*, to require the School District to do what it would have undertaken to do and that is to submit to the School Board for approval or disapproval what the School District had said it was going to pass on. Do you follow me?

* * *

(4)

No. 90-499



IN THE
Supreme Court Of The United States

OCTOBER TERM, 1990

ACMAT CORPORATION,

Petitioner,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

**PETITIONER'S REPLY BRIEF
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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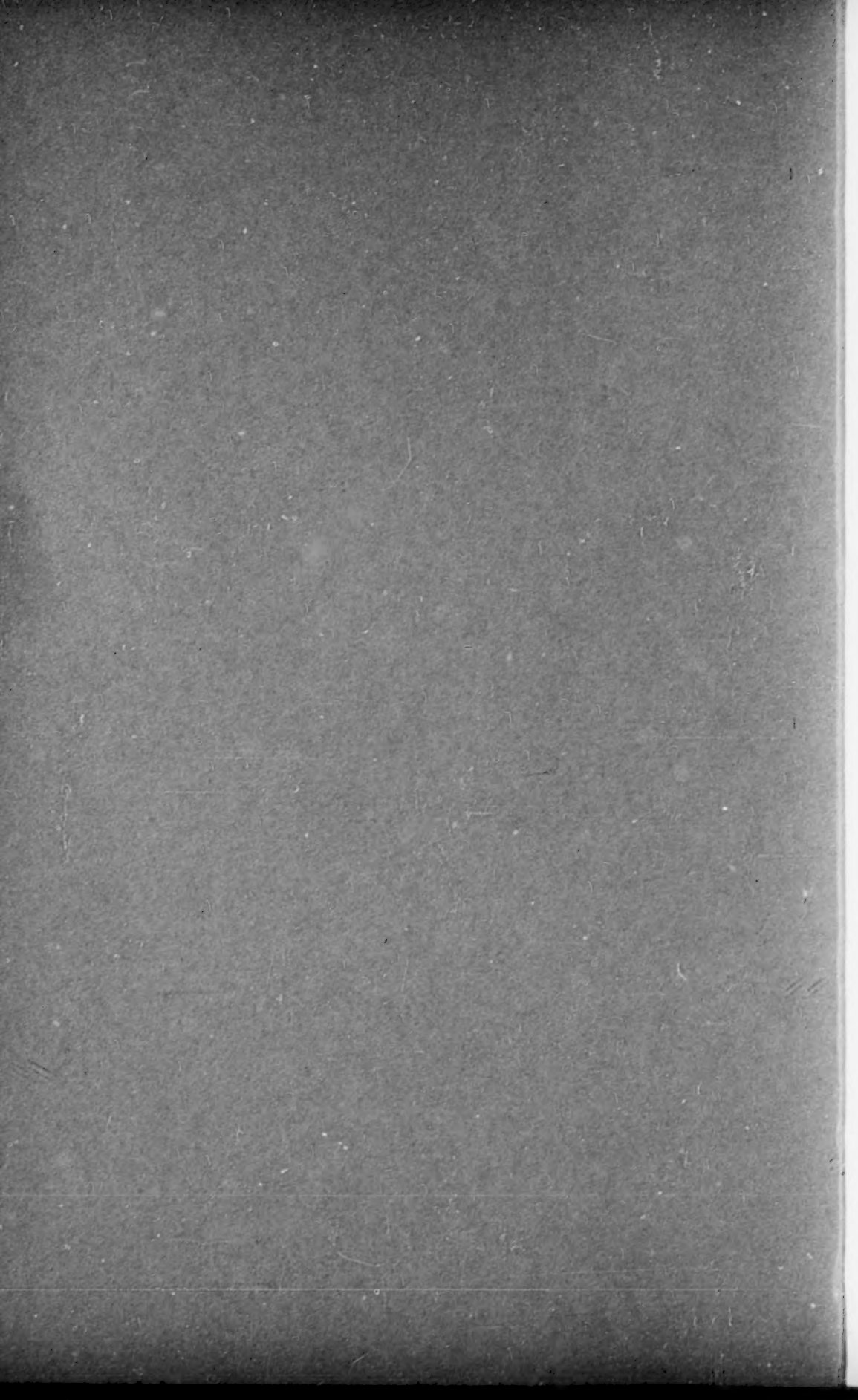


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IN THE
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**PETITIONER'S REPLY BRIEF
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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

ARGUMENT

**I. SPECIAL AND IMPORTANT REASONS
REQUIRE THAT THE PETITION
FOR A WRIT OF CERTIORARI BE GRANTED**

The lower federal courts in this case ignored state court precedent and extinguished the well settled right of a party to a contract with the Commonwealth of Pennsylvania and its political subdivisions ("Government") to a full, fair and impartial hearing of its contract claims. The effect of the lower courts' decisions is to give the

Government sovereign immunity in virtually all of its publicly bid adhesion construction contracts, a principle that the Pennsylvania legislature has declined to enact into law. These decisions impact on the entire construction industry. Not only will they discourage contractors from entering into contracts with the Government in the future and cause a steep rise in the cost of public construction, they will retroactively eliminate the legitimate expectations and legal rights of contractors, currently under contract with the Government, to have their claims adjudicated in a court of law.¹

II. THE LOWER COURTS' DECISIONS CONSTITUTE A DENIAL OF DUE PROCESS

The School District of Philadelphia ("School District") does not cite a single case endorsing the irregular course authorized by the lower courts in the case at bar. The lower courts allowed one party to a contract to decide the other party's claims without a hearing and without judicial review.

The School District's argument opposing certiorari attempts to raise a number of erroneous procedural barriers to review that simply do not bear up under scrutiny. Contrary to the School District's assertions, the issue of enforcement of the "final arbiter" provision was raised in the initial papers submitted in opposition to summary judgment (R.A. 56, 57)² and was the subject of oral argument. The issue was raised again in the motion for reargument.³

¹ The significance of the issues raised by this case is further supported by the respondent's cross-petition which bears No. 90-680.

² Pages in parenthesis with the prefix "R.A." refer to appendices attached to respondent's brief in opposition.

³ Acmat also raised the due process argument in a Supplemental Memorandum of Law in response to the School District's Motion to Dismiss which was based on

(R.A. 86) Also, contrary to the School District's contentions, the record shows that Acmat's motion for reargument was considered on the merits, but that the district court concluded that nothing new had been raised on reargument and that all of the points had been raised previously. (Appendix ["App."] D at 51a).⁴ Accordingly, the School District is incorrect in stating that the issues presented in the petition for a writ of certiorari were not timely raised. The School District's only substantive argument on the due process issue is premised on the quote of the first two sentences of a paragraph in the Pennsylvania Superior Court's opinion in *John F. Harkins Co., Inc. v. School District of Philadelphia*, 313 Pa. Super. Ct. 425, 460 A. 2d 260 (1983). That paragraph, however, goes on to explain that the contractor has the right to prove additional damages by a preponderance of the evidence. This is a clear reference to a trial before a court of law. The School District must have recognized the true import of the *Harkins* opinion because the next paragraph of its brief asserts that the case should not be followed, as it is an intermediate appellate court decision. It is well established, however, that a federal court sitting in diversity will accept the holding of a state intermediate court, except when it is convinced that the highest state court would hold otherwise.⁵ As stated in Acmat's petition for certiorari, *Harkins, supra*, is directly on point and is consistent with principles of due process. It was clearly improper for the lower courts to allow the School District to sit as judge and jury over its own case and then to refuse judicial review.

(fnt. 3 cont'd) virtually the same grounds as the Motion for Summary Judgment.

⁴ Appendices A through J are attached to Acmat's Petition. Appendices K through M are attached hereto.

⁵ The lower federal courts ignored *Harkins, supra*, despite the fact that it was extensively briefed by Acmat.

III. PREVAILING LAW RECOGNIZES THE CAUSES OF ACTION ASSERTED BY ACMAT

The School District continues to mischaracterize all of Acmat's claims as "extra work" because of the requirements for recovery of damages therefor. However, the Pennsylvania courts recognize that claims for differing site conditions [*Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A. 2d 306 (1964)], delay damages [*Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A. 2d 862 (1986)] and breach of contract [*Brinton v. School District of Shenango Township*, 81 Pa. Superior Ct. 450 (1923)], are separate and distinct from claims for extra work and are entitled to compensation even when claims for extra work are disallowed. The lower courts failed to discern the distinction among the different categories of claims asserted by Acmat in this action.

A. The lower courts ignored *Teodori*, which permits recovery for differing site conditions when the contract so provides.

It is submitted that the contractual language reviewed in *Teodori*, *supra*, is remarkably similar to that under consideration herein and that it authorizes recovery for the differing site condition claims asserted by Acmat. The contract in *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), did not contain a differing site condition clause and its requirements for inspection were far more comprehensive than the inspection required of Acmat. In this connection, it should be understood that Acmat performed a pre-bid site inspection of the premises. (R.A. 64-R.A. 66, App K at 2a-4a, App. L at 8a-11a). There was no evidence that the inspection was not made and the statement in the School District's brief to the contrary is incorrect. The district court made the improper finding on a motion for

summary judgment that a *reasonable* site inspection was not made.⁶ (App. C at 8a, 9a).

The School District's claim of insufficient notice is also incorrect since the volumes of project documents submitted in opposition to the motion for summary judgment show that the School District expressly directed the work performed by Acmat on account of differing site conditions.

B. Acmat is entitled to a trial on its claims for breach of contract, delay damages and quantum meruit recovery.

There can be no better example of denial of due process than the dismissal of Acmat's common law breach of contract claims. It demonstrates the improper granting of contractual immunity to the Government by the lower courts and so clearly shows the improper expansion of the *Nether* decision beyond all reasonable bounds. Breach of contract was alleged in Acmat's complaint and the nature of the breaches was the subject of argument in the papers opposing summary judgment and at oral argument. (R.A. 49, 50; App. K at 4a-7a). The School District's statement that this issue was not timely raised is incorrect.

The School District's argument concerning delay damages ignores the Pennsylvania cases permitting damages for delay despite the presence of exculpatory language. The sole case cited by the School District on this issue concerns Delaware law and has no bearing on this case. It is submitted that the law and facts presented in the petition show entitlement on a quantum meruit basis and that

⁶ The "reasonableness" of the site inspection that was made was a "jury" question of fact and not one for the district court to have made on a summary judgment motion.

the claims based on that cause of action should have proceeded to trial.

IV. IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT TO REJECT AN INSTRUCTION ON THE LAW OF IMMATERIAL BREACHES

The School District's argument is essentially that a party to a contract forfeits its right to contract balances no matter what the amount or magnitude of the alleged breach. The amount at issue in this instance is in the sum of \$150,909.14, but could easily have been substantially greater had additional sums been withheld prior to completion of the projects. The retainage amount denied Acmat bears no relationship to the breach alleged and the School District showed no damages as a consequence of not having all the dump tickets.⁷ Nor did the School District show that the debris had been disposed of improperly. The issue is solely one of documentation and is the type typically excused as an immaterial breach in construction litigation. The district court's failure to charge on the law of immaterial breaches was expressly excepted to at trial (App. M at 12a-14a) and constitutes reversible error.

⁷ A significant number of dump tickets were received in evidence at trial, but copies of all the dump tickets could not be located. There was testimony, however, that they had all been mailed to the School District. In fact, Mr. Brazil, the School District's counsel at the time, with full knowledge of the contractual requirements concerning dump tickets, testified that he authorized payment of the *entire* contract balance due Acmat.

CONCLUSION

Acmat has been denied recovery of damages in excess of \$6 million without any hearing whatsoever.

For these reasons, a writ of certiorari should be issued to review the judgment order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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*Counsel of Record and
Attorney for Petitioner
Acmat Corporation*

Joseph P. Dineen
Edward A. Stein
Goddard & Blum
Of Counsel

November 15, 1990

APPENDICES



**APPENDIX K—EXCERPTS FROM TRANSCRIPT OF
ARGUMENT ON MOTIONS FOR SUMMARY
JUDGMENT ON OCTOBER 31, 1988**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ACMAT,

Plaintiff,

vs.

PHILADELPHIA SCHOOL DISTRICT, et al.

Defendant.

CA No. 85-7067

Philadelphia, PA

October 31, 1988

9:05 a.m.

**TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE**

*Appendix K***APPEARANCES:****For ACMAT:**

ANDREW B. COHN, ESQUIRE
GLENN F. ROSENBLUM, ESQUIRE
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School District:

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For Marshall Marcus:

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(Proceedings recorded by electronic sound recording,
transcript produced by transcription service.)

* * *

THE COURT: Well, what was done affirmatively by the School District to cause ACMAT not to make the kind of inspection it now says it should have made?

MR. COHN: ACMAT was given an extremely brief walk-through type opportunity.

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THE COURT: My understanding is that the person who did the walk-through decided not to lift up the ceiling tiles and it was the failure to lift up the ceiling tiles, which were known to be the layer between the looker and the asbestos, that caused ACMAT to proceed with its bid and certain assumptions. Now, what affirmatively did the School District do to keep ACMAT from making the kind of physical inspection it now says that it should have made?

MR. COHN: Judge, with all deference, I believe your understanding is incorrect. I believe the testimony developed during discovery was that indeed some of the ceiling tiles were lifted, but not all of them. It would have taken weeks -- months -- to go through each one of those school rooms and expose the entire ceiling underside to determine exactly whether this overspray condition, which ACMAT contends the School District knew about or should have known about...

THE COURT: Where is that in the reply to the motion for summary judgment? The School District has submitted deposition testimony of your superintendent, I believe, who testified that upon beginning the work and upon lifting the ceiling tiles, the problems were readily ascertainable.

MR. COHN: Judge, my...

THE COURT: Where in your submissions is there a counter statement that the kind of inspection that was done upon the inception of the work, could not have been done during the inspection visit in preparation for the bid?

MR. COHN: My recollection of the testimony of ACMAT's employee, Mr. Nozko, specifically was that the opportunity given to ACMAT to inspect was essentially limited to a walk-through on

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one day or two days. I cannot point to specifically, Judge. I would be pleased to.

THE COURT: Okay. Now, let me ask you another question.

MR. COHN: Yes.

THE COURT: In the brief in opposition, I believe that ACMAT makes a statement or alludes to something which is unsupported by any documentation. My recollection is that it was something that amounts to a statement that the School District, in the bid invitation, made some kind of misrepresentation or mislead ACMAT in some way to cause ACMAT to make the kind of bid that it made or the certain assumptions that it made. Is there anything in the record that suggests that ACMAT was misled by some statement of the School District?

MR. COHN: I believe Your Honor is referring to the overspray condition and ACMAT's...

THE COURT: Yes. Okay. Overspray.

MR. COHN: ...ACMAT's position on that is that the overspray condition was not disclosed and that the School...

* * *

THE COURT: The problem I have is this. It seems to me that if the parties entered into an agreement such as the one here where there's no arbitration provision and there is a dispute as to whether or not the work should continue—you know—you're not certain something is within the scope of the work...

MR. COHN: Yes.

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THE COURT: ...and the parties can't reach some interim agreement—you know—we'll do the work and then we'll fight about it or we will limit the issues for resolution...

MR. COHN: Or submit it to arbitration during the project, which often happens.

THE COURT: Yes. I mean, the only option to the contractor is to refuse to do the work and force the School Board to sue. And thereby raising, in a proper forum, at a proper time, before expenditures of money have been incurred, the contract interpretation dispute. How else is it to be done? What you propose is this. That the contractor unilaterally should determine to go ahead with the work, no matter what it costs, and then send a bill to the School District after the fact saying, we contend that this is within the scope of the work clause and, School District, you have to pay us now all that we have incurred in the way of expense. What you propose then may sound fair, but basically the contractor then is in control of the purse strings and not the School Board. And that's the problem with the School Board law.

MR. COHN: Judge, this contract provided affirmatively for an equitable adjustment if certain work beyond the scope of the contract was performed.

THE COURT: Well, I agree. I agree.

MR. COHN: Yes.

THE COURT: The problem is, if it's beyond the scope of the contract. So you put the rabbit in the hat, but you don't answer the question. The only way that this accountability requirement upon

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the public officials can be met is if they, in advance, approve the expenditure of money.

MR. COHN: Which the School Board had the opportunity to do...

THE COURT: Well...

MR. COHN: ...and then chose not to do it...

THE COURT: Okay. Okay.

MR. COHN: ...for whatever reason.

THE COURT: We're not going to do it. We're not going to pay the money. The School Board makes that decision. The School District informs ACMAT, we have made a decision not to pay twice for the same work.

MR. COHN: Yes. Understood.

THE COURT: Then ACMAT goes ahead and incurs the expense.

MR. COHN: ACMAT has a choice at that point. It can say, fine, we're not going to do the work. In which case, as a practical reality, on this project the job would have come to a grinding halt...

THE COURT: Oh, it may have. It may have.

MR. COHN: The schools wouldn't have been open and the asbestos health hazard would have remained and ACMAT probably would have been subject to litigation at that point. The flip side, which is what ACMAT chose to do, was fine, you think it's within the scope of our contract, School Board? We do not. We are going ahead, based on the contract which says that if we do work outside

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the scope there shall be an equitable adjustment. We're willing to take the risk. We think that this work was not properly included within our contract and in order for us to fully perform the remainder of the contract we have to do this work, too.

We're already in there. We already have forces mobilized. You've been on our backs for weeks to get this job done, to get this school open in the Fall, and remove this health hazard. We're going to do the work, but we're going to hold you accountable. And that's what ACMAT did. Now, I think Your Honor is concerned that now there's still a dispute and someone has to resolve it and that's this Court.

THE COURT: Well..

MR. COHN: But I think that's what the contract contemplated. If there's a dispute over whether certain work was within or without our contract and if there's a factual dispute over what the proper cost for doing that work was,...

* * *

**APPENDIX L—AFFIDAVIT OF FREDERICK F. DALTON,
SWORN TO ON JUNE 2, 1989**

In The United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,

Plaintiff,

v.

THE SCHOOL DISTRICT OF PHILADELPHIA,

Defendant.

AFFIDAVIT

**HON. JAMES T. GILES
CIVIL ACTION NO. 85-7067**

STATE OF CONNECTICUT)

) ss:

COUNTY OF HARTFORD)

Frederick F. Dalton, being duly sworn, deposes and says:

1. I am a former project manager for Acmat Corporation; having been in their employ from 1979 to 1986. This affidavit is made at the request of Acmat Corporation in connection with its motion to reargue the prior motion in

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which partial summary judgment was granted to the School District.

2. During the first part of 1984 I became aware of the fact that an asbestos abatement program was about to be undertaken by the School District of Philadelphia in the city's public schools. My employer asked me to attend the pre-bid meeting that was scheduled for January 24, 1984 and I reported back to the Company immediately after the meeting. Nothing of an unusual nature was discussed at the meeting and Acmat remained interested in bidding the various projects.
3. Thereafter, I returned to Philadelphia to participate in a pre-bid inspection of several schools that were being conducted by the School District. I found that I was one of many bidders that made up a group that would visit several schools during the day. We actually formed a caravan of vehicles as we were ushered from one school to another.
4. These site visits were conducted like tours with the School District's consultants acting as tour guides. School District personnel were also present during the site visits. I visited several schools during the one day tour. The bidders were kept together as a group and were not permitted to wander off to any areas by themselves.
5. Certain ceiling tiles were missing or were removed during the site visit by the owner to allow the bidders to apprise themselves of conditions above the ceiling. I saw the typical conditions that one would expect to find on such a project. Asbestos fireproofing on the structural beams was visible, as well as, the customary amount of overspray. No unusual

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conditions were detected or described by the School District and the inspection was typical for this type of project. I have participated in many such site inspections before and since the one in Philadelphia.

6. None of the participants in the site visit were wearing protective clothing or gear that would allow the bidders to raise or dislodge other ceiling tiles. Exposure to asbestos is a real possibility unless special precautions are taken before and during tile removal. Nor was there any reason to perform a more penetrating site examination since the conditions that were shown to exist seemed perfectly normal for this type of project. As a matter of fact a more comprehensive site examination that would have detected every particle of asbestos would have been impossible without demolishing permanent structures in the building and that was not a feasible approach to take. I reported my findings to the Acmat home office.
7. On a separate occasion, prior to Acmat's finalization of the Rush School contract, I visited the Rush School to conduct an inspection and did so with the School's custodian. I found nothing of an unusual nature and once again reported my findings back to the main office.
8. I understand that contracts were signed for asbestos abatement at three schools. I had no further connection with the project, but the actual conditions found in the buildings have been described to me.
9. The overspray condition that was described to me and the other conditions that became known when the ceilings and other structures were removed came as a great surprise to

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me. There was no evidence that these conditions were present and the bidders were never told that such conditions could be present at the site.

Signature X

Frederick F. Dalton

Sworn to before me this 2nd day of June, 1989.

Signature X

Notary Public

**APPENDIX M—EXCERPTS FROM TRANSCRIPT OF
TRIAL ON JULY 13, 1989**

In The United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT

v.

SCHOOL DISTRICT OF PHILADELPHIA

Philadelphia, Pennsylvania

July 13, 1989

CIVIL ACTION NO. 85-7067

JURY TRIAL

BEFORE THE HONORABLE JAMES T. GILES, J.

UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Plaintiff:

ANDRE DENNIS, ESQUIRE

2600 One Commerce Square

Philadelphia, PA 19103

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For the Defendant: JOSEPH DINEEN, ESQUIRE
675 Third Avenue
New York, NY 10017

Audio Operator: Andrew Schwab

Transcribed by: Tracey J. Williams

(Proceedings recorded by Electronic Sound Recording,
transcript produced by transcription service)

* * *

THE COURT: Well, you didn't put any evidence in on that.

MR. DINEEN: Well, your Honor wouldn't permit us, as I recall, to put in evidence.

THE COURT: You didn't have any evidence. Your evidence was that the contract was—that by a certain date the work was done. You did not contend that there was substantial completion earlier than the date you left the job.

Let's go on.

MR. DINEEN: You didn't charge the jury, your Honor, that the damages which the School District claims have to have a reasonable degree of certainty to the alleged breach by Acmat.

Your Honor failed to charge the jury on the issue of immaterial breach in connection with the dump tickets.

THE COURT: You don't consider that immaterial breach, do you?

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MR. DINEEN: Your Honor, in light of the testimony—

THE COURT: Even if you failed to supply it?

MR. DINEEN: In light of the testimony that was adduced at this trial, your Honor should—

THE COURT: You didn't even argue that was an immaterial breach.

MR. DINEEN: That was argued earlier in the case, your Honor.

THE COURT: You didn't argue to this jury that that would have been an immaterial breach. Your evidence was to the contrary, that it was very important.

Go ahead.

MR. DINEEN: Your Honor also indicated that the School District's position on the dump tickets is that they never received them and I don't believe there was any credible testimony offered at this trial to that effect. Mr. Brazil indicated that he didn't recall receiving them, but that is not evidence that the School District didn't receive them.

THE COURT: That's your recollection of what he said.

MR. DINEEN: Everything is based on that, your Honor.

THE COURT: Thank you very much.

(End of sidebar discussion.)

* * *

